Supreme Court, U.S.
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No.

In the Supreme Court of the United States

GEORGE NAFZIGER, ET AL.,
Petitioners,

v.

McDERMOTT INTERNATIONAL, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) (a). In a multiparty complex litigation case, where the complaint though long does not otherwise violate Civ. R. 8 (a), does fair notice under *Conley v. Gibson*, 335 U. S. 41 (1957) require each plaintiff, in addition to setting forth the factual basis for each claim, to specifically assert the separate legal theories for recovery of each Plaintiff.

1) (b). Assuming, *arguendo*, that plaintiffs in the above situation identified, or are required to identify under the *Conley* case, the legal theories for recovery [i.e. "causes of action"] is "fair notice" satisfied where the complaint specifically identifies both the individuals who are asserting legal theories not joined by the entire group and the elements of those causes of action and imply that all other causes of action are brought by the entire group. In other words, can fair notice be satisfied were presentation of legal theories in the complaint imply that unless otherwise stated each plaintiff is asserting each legal theory against the specified defendant, or is more specifically required under Civ. R. 8 (a) regardless of other factual allegations in the complaint.

1) (c). Whether the correct standard for pleading a complaint should follow the Sixth Circuit, which requires that "the complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory" or whether the Seventh Circuit is correct by only requiring that the "point of the notice pleading standard under the federal rules of procedure is that the plaintiff is not required to plead either facts or legal theories... complaints do not need to match facts to "elements" of a legal theory".

2) Does a court of appeals err in refusing to accept the filing of a motion for reconsideration where the attorney is out of the country in Cambodia when its decision on the merits is entered but where the attorney returns to the United States and prepares to file a good faith motion for rehearing or reconsideration on the last day it is due but is told by a clerk of courts that, rather than drive forty-five (45) miles, to place the petition in the mail with a motion to accept the filing by mail and that same would be granted.

LIST OF PARTIES

The Petitioners are George Nafziger, James McKnight, Mark Becker, James England, Elias Spryou, Rick Christopher, Cynthia Eby, Carla Jendrek, Carole Robinson-Burks, Albert Gibson, H. Kay Hurston, John Bruno, Linda Hastings, Deborah Witten-Hagen, Cheryl Applegate, Paula Niebal, Teresa Fox, Shirley Barker, Debbie Coons, Josephine Watson, Warren Bowling, Jerry Koons, Larry Lamsa, Carolyn Andrews, Tim Tayse, Gayle Jewett, and Paul Weinman, et al.

The Respondents are McDermott International, Inc., McDermott, Inc., BWX Technologies, BWXT Federal Services, Inc., BWXT of Ohio, Inc., et al.

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Petitioners respectfully requests the Court to issue a writ of certiorari to review the judgment of the United State Court of Appeals for the Sixth Circuit which affirmed the order of the United States District Court for the Southern District of New York dismissing their complaint for failure to comply with Fed. R. Civ. P. 8 (a)(2) and subsequently overruled a motion for leave to file for reconsideration, out of time.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 467 F.3d 514 (C.A. 6, 2006) and reproduced in the Appendix at App. E at 19a. The decision denying the motion for reconsideration is not reported but is reproduced in the Appendix at App. C at 7a. The opinion of the District Court is unreported. It is reproduced in the Appendix at App. G at 49a.

JURISDICTION

The Court of Appeals entered its judgment on October 20, 2006. App. E at 19a. A petition for rehearing accompanied by a motion for leave to file by mail on the date due, was mailed for filing on November 3rd after being advised on that date by the clerk's office to send it by overnight mail rather than making the drive. See App. A at 1a-6a and App. C at 8a-9a. The motion for leave was overruled *instanter* on November 16, 2006. App. B at 7a. The jurisdiction of this Court is conferred by 28 U.S.C.§ 1254(1).

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 8(a)(2) of the Federal Rules of Civil Procedure ("F.R.C.P.") provides in relevant part: "A pleading . . .

shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . ."

STATEMENT OF THE CASE

Initially, so the Court better understands the procedural posture of this case, on October 19, 2006, Counsel departed from the United States on a personal matter, arriving in the Kingdom of Cambodia on October 21, 2006. A copy of relevant pages from Counsel's passport is attached hereto in App. J at 118a. Meanwhile, the Court of Appeals issued a decision (App. E at 19a) in the instant case on Friday October 20, 2006, which arrived in Counsel's office on Monday October 23, 2006. Counsel was advised of the decision on October 26 Cambodian time[1] but was not able to read the decision until his return following a grueling thirty (30) hour flight. See App. A at 1a-6a, App. C at 8a-9a, App. J at 118a. Upon reviewing the decision it appeared that the Circuit Court erred in concluding that issues associated with the initial dismissal of the brief, was not argued in the brief. See App. D at 10a-16a. Other possible meritorious errors were also noted but are not pertinent to the issues sought to be raised in this petition and are not raised herein solely for strategic reasons.

Counsel drafted the motion for reconsideration limiting his arguments to the most pertinent. Typing was concluded and Counsel was preparing to personally drive approximately 45 miles for the filing of the motion from Dayton Ohio to Cincinnati, Ohio. App. A at 1a-6a, App. C at 8a-9a. A diligent first year associate attorney, telephoned the Clerk of

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[1] Cambodian time involves a twelve hour increased time difference compared to United States eastern standard time.

Courts regarding my plan to drive the motion for reconsideration for the Sixth Circuit. He was told it was not necessary to drive the motion so long as it was placed in overnight mail postmarked November 3, which was the due date, with a motion to accept it accordingly and the same would be granted. The associate also prepared a motion for late filing so as to advise the Court of Appeals of the unusual travel circumstances associated with the mail filing. App. A at 1a-6a and App. C at 8a-9a. Based upon the representations to the associate, the motion for reconsideration was mailed as suggested. On November 16, the Court of Appeals overruled the motion(s) *instanter*. Counsel was preparing to file this petition on the merits when informed by the publisher that it was not due until February 14, 2007. App. A at 1a-6a.

Regarding the merits, Plaintiffs-Petitioners are twenty-eight (28) individuals, not including their spouses, who were employed at the federal nuclear Mound Facility situated in Miamisburg, Ohio. They joined together to bring this lawsuit to conserve their limited resources and because they all shared some claims in common, which arose from a reduction in force (RIF) at the Mound facility. Some Petitioners also had individual claims, which typically formed subgroups. For example, four (4) African-Americans alleged race discrimination, through the factual basis for these claims differed somewhat with each individual.

Originally, Petitioners filed their complaint on May 22, 2003 in the Cincinnati location of the Southern District Court of Ohio. The complaint was amended prior to any response by Defendants-Respondents on June 26, 2003 primarily add a party. Respondents filed various motions to dismiss the complaint of which their August 7, 2003 and February 20, 2004 motions pursuant to F.R.C.P. 8 (a) are pertinent to this

petition. On August 20, 2004, the case was transferred from Cincinnati to Dayton by Court order.

On October 5, 2005, the District Court dismissed all Defendants with prejudice except for Respondent BWXT and allowed re-service on Respondent BWXTO. With regards to these Respondents the Court held that though the Complaint was long (132 pages) it did not violate F.R.C.P. 8 (a)(2) except in one respect, to wit; the district court held that to provide "fair notice" under *Conley v. Gibson,* 335 U.S. 41 (1957), F.R.C.P. 8 (a)(2) required the Complaint to identify which plaintiffs were asserting their legal theories, or causes of action for relief.[2] App. G at 79a-83a. Further, though

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[2] The District Court's decision held, at pages 28-31, in pertinent part:

> Failure to Comply With Pleading Requirements
>
> ...Remaining is BWXT's Motion to Dismiss for failure to comply with pleading requirements.
>
> Fed. R.Civ.P. 8 (a)(2) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief, " and Rule 8 (e)(1) requires that "[e]ach averment of a pleading be simple, concise, and direct." The purpose of these requirements is to give the defendant fair notice of the plaintiff, the claim and the grounds for the claim. *Conley v. Gibson*, 355 U. S. 41, 47 (1957). Further, a complaint is to be construed as to do substantial justice. Fed.R.Civ.P. 8 (f)...
>
> "[T]he appropriate length and complexity of a complaint will vary with each case. *Morgan v. Kobrin Securities, Inc.*, 649 F. Supp. 1023, 1026 (N.D.Ill. 1986). Complaints that appear to be prolix and muddled have been

dismissed when the Court was unable to determine what the claims were and the complaint was neither short nor plain. *Collier v. First Michigan Cooperative Housing Association,* 274 F.2d 467, (6th Cir. 1960). In addition, complaints that are confusing, disjointed and repetitive have been dismissed when the court is unable to determine the necessary elements and the factual allegations upon which the claims are based. D*udley Enterprises, Inc. v. Palmer Corporation*, 822 F. Supp. 496, 50 (N.D.Ill. 1993). However, complaints that are lengthy and yet succinct and easily understandable and involve several parties and several claims may satisfy Rule 8 requirements. *Morgan*, 649 F. Supp. at 1027; *Honorable v. The Easy Life Real Estate System, Inc.*, 182 F.R.D. 553, 562 (N.D.Ill. 1998).

The Plaintiffs are entitled to bring forward a lengthy complaint, particularly where it involves multiple plaintiffs, multiple defendants and multiple causes of action. Also, each defendant is entitled to be able to ascertain which causes of action are being pled against him or her by which defendant based upon which set of factual allegations.

In this case, Plaintiffs' Amended Complaint is 132 pages long, contains 1157 paragraphs and alleges twenty-four (24) causes of action. Forty-eight (48 named Plaintiffs and nine (9) named Defendants are identified in the Amended Complaint. BWXT seeks to have the Amended Complaint dismissed because it is "unreasonably confusing and improper."

In this case, Plaintiffs' Amended Complaint is lengthy but it involves multiple Defendants, multiple Plaintiffs and multiple Causes of Action. However the specific Plaintiffs that re-bringing certain claims cannot be determined....

However, rather than identifying the parties bringing the cause of action as the "Plaintiffs" or the "Spousal Plaintiffs", specific

the headings of, the first, second, third, fourth, sixth, twelfth, fourteenth, and eighteenth causes of action specifically state

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names are identified as bringing certain of the causes of action. Yet, only the last name is provided and two individuals, with the same last name are listed as Plaintiffs in the Caption of the Amended Complaint....

As a result, which specific Plaintiff or Plaintiffs are bringing the Second, Third, Fourth, Twelfth, Fourteenth, and Eighteenth Causes of Action cannot be determined.

The remaining causes of action, with the exception of the Fifth and Sixth, are presumably brought by the "Plaintiffs" as they are identified in paragraph 2 of the Amended Complaint. The Sixth Cause of Action is brought by one of the Plaintiffs specifically identified by name. The Fifth Cause of Action does not set forth specific names but ... any Plaintiff who is identified in the Amended Complaint as being exposed to radiation to hazardous chemicals is bring this Cause of Action ...

As to the identification of Defendants, each Cause of Action specifies that it is being brought against all Defendant or all Defendants with the exception of those specifically named. This is enough for the each of the Defendants to identify which claims are being brought against them...[T]herefore, the Amended Complaint arguably sets forth whatever grounds are available for each claim.

In sum, the Court is unable to identify which of the named Plaintiffs is bringing several of the Causes of Action. Also striking only these Causes of Action would presumably lead to attempts to modify an already lengthy and complicated document and result in further confusion. Therefore, the entire Amended Complaint against BWXT is dismissed.

which Petitioners, who were employed at the Mound facility[3] were asserting those legal theories for recovery and implied the remaining claims were asserted by all, (see App. H at 88a-113a) the District Court apparently this was not sufficient "fair notice" of the legal theories (or causes of action) for recovery asserted by such individual Plaintiff.

A brief discussion of the structure of the complaint may be helpful in understanding the extraordinary efforts by Plaintiffs to present their case in a meaningful and understandable pleading. Although the amended complaint was long, consisting of 132 pages, it was separated into divided into five (5) sections:

1) Jurisdiction.

2) Parties.

3) General Allegations at pgs. 8-29 (¶¶ 16-183)[4], which

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[3] The spouses of these workers alleged loss of consortium claims, however, one spouse was a former worker at the Mound facility and, therefore, did have some individual claims.

[4] The Contract and other documents associated the allegations in this section are voluminous. Since interpretation of documents and contracts are important it served judicial economy to set forth which previsions are at issue and why. Accordingly, rather than attempting to attach the contract, or obscure what is at issue, the pertinent provisions are quoted or paraphrased directly in the Complaint. Often the source is cited, either in the paragraph or at a footnote. To add additional clarity the General Allegations section has seven (7) subparts: 1) Background Allegations, pgs. 8-9 (¶¶ 16-25), 2) General History of The Mission of The Mound Facility and its Impact on its Worker, pg. 10-12 (¶¶ 26-50); 3) Background on The Contractors...and ...Impact On. The Workers at The Mound

were alleged by all the petitioners and primarily associated with documents such as contract provisions, documents associated with layoff or involuntary separation plan (ISP), and reduction in force (RIF) documents.

4) Individual Allegations at pgs. 29-118, (¶¶ 184-1035)[5], with length ranging from six pages to less than two pages per Petitioner, and which explicitly and separately for each Plaintiff and,

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Facility, pgs. 13-77 (¶¶ 51-77); 4) Reaction to the 1997 Contract at issue, pgs. 16-17 (¶¶ 78-84); 5) Pertinent Requirements and Provisions of The Mound Contract, pgs. 17-22 (¶¶85-127); 6) The Layoff Process, pgs. 22-24 (¶¶ 128-133); 7) Reduction In Force (RIF), pgs. 24-29 (¶¶ 134-183).

[5] The allegations for the primary individual Plaintiffs are set forth as follows: George Nafziger, pgs. 29-34 (¶¶ 184-35); Rick Christopher pgs. 34-7 (¶¶ 236-69); Mark Becker, pgs. 37-41 (¶¶269-04); Elias Spyrou, pgs. 41-4 (¶¶ 305-33); James England, pgs. 44-7 (¶¶ 334-56); Cynthia Eby, pgs. 47-53 (¶¶ 357-412); Carla Jendrek, pgs. 53-6 (¶¶ 413-45); Carol Robinson-Burkes, pgs. 56-60 (446-81); H. Kay Hurston, pgs. 60-4 (¶¶482-518); Albert Gibson, pgs. 64-6 (¶¶ 519-42); Josephine Watson, pgs. 66-9 (¶¶543-571); Shirley Barker, pgs. 69-72 (¶¶ 571-606); James McKnight, pgs. 72-7 (¶¶607-665); John Bruno, pgs. 77-81 (¶¶ 666-99); Cheryl Applegate, Pgs. 81-83 (¶¶ 700-14); Jerry Koons, pgs. 83-85 (¶¶ 715-24); Debbie Coons and Gary Coons, pgs. 85-8 (¶¶ 725-61); Paul Weinman, pgs. 89-90 (¶¶ 762-83); Tim Tayse, pgs. 90-2 (¶¶ 784-801); Carolyn Andrews, pgs. 92-96 (¶¶ 802-33); Gayle Jewett, pgs. 96-98 (¶¶ 834-55); Warren Bowling, pgs. 99-101 (¶¶ 856-78); Larry Lamsa, pgs. 101-03 (¶¶ 879-95); Linda Hastings, pgs. 103-05 (¶¶ 895-917); Deborah Whittenhagen, pgs. 106-10 (¶¶ 918-61); Paula Niebal, pgs. 110-13 (¶¶ 962-93); Teresa Fox, pgs. 113-15 (994-1011); Vicki Fitzpatrick, pgs. 115-18 (¶¶ 1012-35).

5) Legal theories or Causes of Action, at pgs.118-131 (¶¶ 1036-1157).[6]

Average page length of the entire amended complaint, per Plaintiff (not including spouses), is 4.71 pages. Additionally, over 50% of the complaint was 3 lines or less and almost 70% of the complaint was 5 lines or less. Averments longer than five (5) lines (which comprise only 18% of the amended complaint) focused primarily on quoting or paraphrasing passages from documents that were at issue.

Both the original and Amended Complaint was designed so that each defendant, if they read the Complaint, could understand the allegations against them by any individual (by simply reading the individual claims under the individual's name) or the group as a whole. To further facilitate understanding of the incidents that are alleged to give rise to the allegations, approximately one-third (1/3) of the paragraphs in the third and fourth sections specifically identify one or more Respondents[7], their officers, employees or agents

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[6] App. H at 86a-115a.

[7] Defendants BWXT and BWXTO are specifically named in over 148 paragraphs. BWXT is also separately identified in, at least, an additional twenty-eight (28) paragraphs, to wit; ¶¶ 10, 12, 13, 65-70, 75, 78, 91, 125, 253, 263, 703-04, 719, 752, 769, 787, 840, 898, 923, 971, 997, 1018). The two corporations are also jointly mentioned in over 120 other paragraphs (¶¶ 4, 9, 12, 17, 21, 23, 47, 50, 72, 81, 82, 83, 121, 123, 124, 126, 130, 131, 136, 137, 154, 179, 180, 188, 191, 192, 198, 209, 213, 214, 220, 240, 243, 245, 246, 250, 261, 265, 270, 271, 274, 278,280, 295, 308, 309, 312, 315, 317, 322, 340, 341, 346, 355, 372, 374, 377, 378, 382, 399, 419-21, 449, 465, 467, 469, 487, 489, 490, 493, 523, 524, 532, 540, 546, 547, 548, 562, 566, 575, 576, 578, 592, 596, 618, 627, 646, 656, 667, 670, 672, 681, 684, 727,743, 754, 766, 768,

by name,[8] Additionally, the complaint identified the specific plaintiffs alleging the legal theories that were not asserted by the entire group in Part 5, Counts 1, 2, 3, 4, 6, 12, 14 and 18 (App. H at 88a-94a, 101a-102a, 104a, 108a). The implication was clearly that all the plaintiffs raised each of the remaining counts. However, the district court held this was insufficient

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780, 789, 795, 804, 858, 863, 895, 924, 928, 975, 998, 1000, 1001-03, 1006,1008, 1012, 1014, 1015, 1024, 1079

[8] Peyton Baker, who managed the Mound for BWXT and BWXTO is named in over 34 paragraphs (¶¶ 11, 14, 125, 126, 137, 140, 154, 225. 273, 274, 275, 277, 278, 284, 287, 291, 376, 425, 456, 457, 459, 798, 976, 1012, 1016, 1017, 1018, 1021, 1022, 1023, 1024, 1025, 1070, 1102, and pg 23 fn. 16); Rick Higgins, one of Mr. Baker's top executives is, for example, specifically identified in the individual claims of Dr. Nafziger (¶¶ 184-235) and Ms. Vicky Fitzpatrick (¶¶ 1012-1035) and is specifically named in 8 paragraphs relative to these individual claims (¶¶ 12, 207-209, 211, 217, 1025, 1070); Mr. Bergin, a BWXT vice-president is named in ¶¶ 13 and 253, which implicate him as a major player in the retaliation and associated claims of Plaintiff Major (ret.) Rick Christopher's claims relative to retaliation for whistle blowing (¶¶ 236-269). Other officers, agents or employees who are alleged to have engaged in specific conduct which give rise to claims include: Ms. Snyder (¶¶ 60-62); Mr. Russell (¶ 125); Mr. and Mrs. Hood (¶¶ 154, 206-28, 243, 247, 250, 277, 378, 393, 1021); Ms. Gallagher (¶¶ 193, 394, 399, 425, 431-35); Mr. Starks (¶¶ 240-41); Mr. Gannon (¶ 248); Mr. Hanson (¶ 249); Mr. Jackson (¶¶ 249-50); Ms. Greenwald (¶¶ 277, 281-82); Mr. Levan (¶¶ 380-83); Mr. Phinney (¶¶ 382, 429); Mr. Cox (¶ 384); Ms. Neff (¶¶ 382, 430-31); Ms. Booth (¶¶ 424-25, 435); Ms. Brown (¶¶ 463-66); Mr. Covin (¶¶ 653-54); Mr. Shepherd (¶ 669); Ms. Eggelston (¶ 685); Mr. Maisher (¶¶ 731-34, 737-38, 740); Mr. Thompson (¶¶ 735-37, 741); Mr. Duncan (¶ 735); Ms. Kirkland (¶ 901); Mr. Barnhardt (¶¶ 925-28, 930, 933-34, 938); Ms. Stovel (¶979, 982); Ms. Harriston (¶ 1024); Mr. Kruger (¶ 1026).

"fair notice"[9] for Respondents to understand which legal theories for recovery are being asserted by each Petitioner.

With regards to the sufficiency of the complaint the Sixth Circuit held that petitioners brief did not address the issues raised by the district court in dismissing the complaint. 467 F.3d at 519-20. (App. E at 26a-28a). A motion for reconsideration was filed, which pointed out that the appellate brief at 16-17 and several footnotes addressed those issues, including the argument that: "The twenty-eight (28) Plaintiffs (not including their spouses) each have separate individual claims unique to the individual's situation as well as joint claims. The joint claims come in two varieties: The first variety involves claims shared with some, but not all, of the

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[9] The district court did not discuss the fact that the 9th Count at ¶¶ 1077-79 specifically mentions it was asserted only by Plaintiffs Weinman, Bruno, Eby and Barker. Though Plaintiffs maintained that the remaining claims were alleged by all Plaintiffs, the 8th Count specifically mentions at ¶¶ 1070-72 Plaintiff Fitzpatrick; and the 15th Count at ¶1116 specifies: "Defendant(s) corrupt activity, which was undertaken for the purpose of increasing profits, increasing bonuses, and improving the appearance of their performance included: a) Depriving employees of benefits by failing to credit Plaintiffs' Bruno, Weinman, Eby and Barker for their time of service at the Mound Facility; b) Inducing Plaintiffs Andrews, England, Hurston, Weinman, Barker, Becker, and Bruno to refrain from participating in the VSP, then by terminating them in the ISP; c) Terminating Plaintiffs Christopher, Nafziger, Becker, and Spyrou, because they complained of improper management practices, including falsification or request s to falsify records; d) Failing or refusing to provide all Plaintiff(s) with the benefits to which they were promised and to which they were entitled; e) Other acts of the Defendant(s) to be ascertained through discovery."

other Plaintiffs[10]. The Second variety involves claims alleged by all Plaintiffs." The motion to reconsider also reminded the Sixth Circuit that Appellant's brief at fn. 6 emphasized the pages in the complaint that set forth the individual factual allegations for each plaintiff. Further, that Appellants' brief at fn. 7 alerted the court that some of the "causes of action" specifically identified the individuals, by name, who asserted those theories for relief. That footnote gave the following nonexclusive examples: race discrimination (count 2), sex discrimination (count 3), national origin discrimination (count 6) and disability discrimination (count 4) identified by name the individuals asserting those legal theories. The portion of the Amended Complaint concerned with the legal theories are found in App. H at 88a-94a, 101a-102a, 104a, 108a.

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[10] The Motion to Reconsider (App. D, 11a at fn1) also stated "As set forth in footnote 7 of Appellants' brief: 'Examples of claims that are shared by some but not all Plaintiffs include, but are not limited to: Race Discrimination alleged by Plaintiffs Robinson-Burkes, Hurston, Watson, and Gibson, all of whom are Black; Sex Discrimination represented by female Plaintiffs Robinson-Burkes, Eby, Hurston, Watson, Coons, Andrews, Barker, Applegate, Jendrek, Niedal, Hastings, Fox, Jewett, Whittenhagen and Fitzpatrick; Disability Discrimination alleged by Plaintiffs McKnight, Koons, Applegate, Becker, Barker, England, Spyrou, Coons and Nafziger; National Origin Discrimination alleged by Plaintiff Spyrou.'"

REASONS FOR GRANTING THE WRIT

I. To Resolve A Conflict In The Circuits Regarding "Fair Notice" When Pleading Under The Federal Rules

This case involves apparent friction in the application of two (2) relatively recent United States Supreme Court cases interpreting F.R.C.P. 8(a) and putting at issue what specifics place defendants in a complex case on "fair notice" as to the "nature" of the claims they are asked to defend.

This friction has given rise to an apparent conflict between the Seventh Circuit and the Sixth Circuit as to the necessary structural content for a complaint to survive the pleading requirements of the Federal Rules of Civil Procedure ("F.R.C.P."). This friction is also apparent in almost 400% increase in the number of cases involving motions to dismissed for F.R.C.P. 8(a) violations followed the decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005) when compared with the period following this Court's earlier decision in *Swierkiewicz v. Coreman*, 534 U.S. 506 (2002). Though exact numbers have not yet been fully identified, it appears that much of this increase has resulted in dismissals. Minimally, this statistic suggests that confusion on this issues relating to the structural requirements for a complaint, which is inhibiting resolution of cases on the merits.

Counsel conducted a Westlaw search designed to identify cases dismissed in the district courts for Civ. R. 8(a) violation.

The search ("dismiss! /p F.R.C.P. /2 8(a)" with specific dates restricted to May 1, 2005 through January 1, 2007),[11] which involved the twenty (20) month period closely following the date of this Court's decision in the *Dura Pharmaceuticals* case. The search resulted in identifying 1,642 (See App. I at 116a).[12]

The same search was done for the thirty-six (36) month period closely following this Court's decision in the *Soreman* case, but prior to the decision in *Dura Pharmaceuticals* case. This search restricted the dates to the thirty six (36) month period from April 1, 2002, through April 1, 2005 and resulted in identifying only 816 district court decisions, which involved motions to dismiss complaints for violating F.R.C.P. 8(a). (App. I at 116a-117a).

In other words, it appears that in a little more than half the time following the *Dura Pharmaceuticals* case, twice as many cases have been struggling with claims the complaint ought to be dismissed for violating the liberal pleading requirements of F.R.C.P. 8(a). It appears that district courts are listening.

This suggests three possibilities: First, possible confusion by plaintiff's attorneys in their understanding of the requirements of F.R.C.P. 8(a); Second, possible judicial misapplication of F.R.C.P. 8(a); or Third, a new stringent standard for F.R.C.P. 8(a) has emerged that needs clarification or return to the historical lessons of the past. Put

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[11] In layman's terms the search identified cases with all variations of the word "dismiss" found within the same paragraph as Federal Rule of Civil Procedure Rule 8 (a).

[12] The search was limited, since search technology could not yet produce the specific data sought.

another way, form is replacing substance in the resolution of disputes in federal court.

The district court's decision in the instant case follows what appears to be a disturbing trend favoring dismissal of cases on technical pleading formalities, during the twenty (20) month period following the decision in the *Dura Pharmaceuticals* case when compared to the three (3) year period following the *Soreman* decision.

Further, as noted above, research also discloses that since the decision in *Dura Pharmaceuticals* only the Sixth and Seventh Circuits have squarely addressed the question of whether and at what level a complaint must set forth the legal theories for relief. The decisions of those Circuits are in conflict. Petitioners submit the Seventh Circuit correctly states the law in this regard.

Petitioners maintain that the district court was overly formalistic. Petitioners separately set out factual allegations supporting their individual claims under subheadings carrying their individual names and identified, for a second time in the complaint those individuals who were asserting legal theories that were not joined by the entire group. App. H at 88a-94a, 101a-102a, 104a, 108a. The impact on Petitioners' case is that if the district court was imposing too great a standard under F.R.C.P. 8(a) and/or if "fair notice" did not require the complaint to specify legal theories for recovery then the district court erred in dismissing the Amended Complaint by requiring that all the individuals be identified at the pleading stage for each legal theory of recovery.

It has been well established law that liberal pleading requirements are designed to put parties only on general notice as to the nature of a claim against them. E.g. *Conley*

v. Gibson, *supra* at 47 (1957); *Weston v. Pennsylvania*, 251 F.3d 420, 429 (3rd Cir. 2001). The courts at one time were encouraged to disfavored motions that argue pleading technicalities since the discovery process under the civil rules will refine the focus of the allegations allowing cases to be resolved on the merits. As stated in *Conley v. Gibson supra*:

> Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues....The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Id. at 47-48.

As recently as 2002, the Court in *Swierkiewicz v. Soreman*, *supra*, reemphasized that relaxed pleading standards are to be ensured by district courts in light of the liberal purposes of F.R.C.P. 8(a) and the overriding objective of the civil rules, to wit; civil lawsuits ought to be resolved on the merits as the preferred avenue for settling controversies.

However, in 2005, this Court held in a complex case with a lengthy complaint, that failure to plead proximate causation and economic damages failed to put defendants on "fair notice as to what plaintiff's claim is and the ground upon which it rests". *Dura Pharmaceuticals, Inc. v. Broudo*, *supra* at 346-47. The Court emphasized:

> Our holding about Plaintiffs' need to *prove* proximate causation and economic loss leads us also to conclude that the Plaintiff's complaint here failed adequately to *allege* these requirements. We concede that the Federal Rules of Civil Procedure require only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. Rule Civ. Proc 8 (a)(2). And *we assume, at least for argument's sake*, that neither the Rules nor the securities statutes impose any special further requirement in respect to the pleading or proximate causation or economic loss. But, even so, the "short and plain statement" must provide the Defendant with "fair notice of what the Plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed2nd 80 (1957). The complaint before us fails this simple test.

Id. at 348 (emphasis added). This passage and the *Dura Pharmaceuticals* case as a whole, can be interpreted to suggest that a complaint must include specific legal theories of recovery and explains why the district court in the instant case focused on the portion of the complaint which set out the elements of various legal theories of recovery. However, previous to the *Dura Pharmaceuticals* case, decisions suggested that a complaint does not need to assert any legal theories for recovery if the allegations are sufficient to support some claim recognized at law.

Following the decision in the *Dura Pharmaceuticals* case the Sixth and Seventh Circuits addressed the question of whether or not the federal civil rules requires a plaintiff to allege, in the complaint, all the legal theories for recovery. The Sixth Circuit specifically held that "the complaint must contain either direct or inferential allegations respecting all

the material elements to sustain a recovery under some viable legal theory". *Southeast Texas Inns, Inc. v. Prime Hospitality Corp.*, 462 F.3d 666, 671 (sustaining motion to dismiss complaint).

However, the Seventh Circuit continues to follow the rule previously followed by all other Circuits and holds, "The point of the notice pleading standard under the federal rules of procedure is that the plaintiff is not required to plead either facts or legal theories... complaints do not need to match facts to "elements" of a legal theory". *Hefferman v. Bass*, 467 F.3d 596, 599 (C.A. 7, 2006) (reversing dismissal under F.R.C.P. 8(a)).

Though this Court has not specifically ruled on the issue, every Circuit prior[13] to the *Dura Pharmaceuticals* case held

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[13] Counsel has sought to identify each Circuit's most recent decision on the issue and found the following: *McLane, Graf, Raulerson & Middletown, P.A. v. Rechberger*, 280 F.3d 26, 38 (C.A. 1, 2002) ("Although the liberal pleading policy embodied in Rule of Civil Procedure does not require a party to specify its legal theory of recovery, the pleadings must at least implicate the relevant legal issues"); *Bessette v. Avco Financial Serv., Inc.*, 230 F.3d 439, 446 (C.A. 1, 2000) ("it is not fatal to a complaint that a legal theory has been mischaracterized or that the precise language invoking jurisdiction has not been used"); *Simonton v. Runyon*, 232 F.3d 33, 36-37 (C.A. 2, 2000) ("Generally, complaint that gives full notice of circumstances giving rise to plaintiff's claim for relief need not also correctly plead legal theory or theories and statutory basis supporting claim"); *Bechtel v. Robinson*, 886 F.2d 644, 649 (C.A. 3, 1989) (party does not have to state exact theory of relief in order to obtain a remedy); *New Amsterdam Cas. Co. v. Waller*, 323 F.2d 20, 24-25 (C.A..4, 1963) ("a plaintiff in his complaint is required only to set forth 'a short and plain statement of the claim. He need not set forth any theory or demand any particular relief for the

that a complaint need not even allege its legal theories, or even correct legal theories for recovery, if the allegations were otherwise sufficient to support some basis for recovery. With the exception of the apparent conflict in the Sixth and Seventh Circuits, research discloses that the other Circuits are remaining silent[14] even while the district courts are facing

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court will award appropriate relief if the plaintiff is entitled to it upon any theory. Under this liberalized practice, a party's misconception of the legal theory of his case does not work a forfeiture of his legal rights"); *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 434-35 (C.A. 5, 2000) ("form of complaint is not significant if it alleges facts upon which relief can be granted, even if it fails to categorize correctly the legal theory giving rise to the claim"); *Hopkins v. Saunders*, 199 F.3d 968, 973 (C.A. 8, 1999) ("It is the facts well pleaded, not the theory of recovery or legal conclusions, that state a cause of action and put a party on notice"); *Fontana v. Haskin*, 262 F.3d 871, 877 (C.A. 9, 2001) ("Under general pleading rules, specific legal theories need not be pleaded so long as sufficient factual averments show that the claimant may be entitled to some relief"); *Elliott Industries Ltd. Partnership v. B.P. America Production Co.*, 407 F.3d 1091, 1121 (C.A. 10, May 10, 2005) ("Generally, failure to set forth in the complaint a theory upon which the plaintiff could recover does not bar a plaintiff from pursuing a claim"); *Evans v. McClain of Georgia, Inc.*, 131 F.3d 957, 964 (C.A.11, 1997) ("complaint need not specify in detail the precise theory giving rise to recovery; all that is required is that defendant be on notice as to claim being asserted against him and grounds on which it rests"); *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1115 (C.A.D.C. 2000) ("complaints need not plead law or match facts to every element of a legal theory"); See also *C&F Packing Co., Inc. v. IBP, Inc.*, 224 F.3d 1296, 1306 (C.A. FED. 2000) (holding under F.R.C.P. 12 (b)(6) that "complaint need not specify the correct legal theory, or point to the right statute, to survive a motion to dismiss, as a complaint merely describes the claim").

[14] See footnote 11.

motions, and, apparently, dismissing cases under F.R.C.P 8(a) at an unparalleled level.

Historically, the modern federal judicial system has generally not required plaintiffs to structure their complaints to allege or to set forth the elements of a legal theory of recovery so long as Defendants have "fair notice" of the allegations against them. *Conley v. Gibson supra* at 46, 47-48. "Fair notice" has been viewed as simply sufficient facts to place Defendants on general notice of the nature of the claims against them so they can draft an answer.[15]

The Federal System has already experienced, and rejected for good reason, an earlier system where technical pleading requirements precluded plaintiffs from having the merits of their claims addressed when there were technical defects in the complaint.

In 1979 this Court in another discrimination case, *Davis v. Passman* (1979) 442, U.S. 228, 237-38, suggested that courts ought not to seek creative ways of returning to a formalistic system that places form over resolution on the merits:

> Almost half a century ago, Mr. Justice Cardozo recognized that a "cause of action" may mean one thing for one purpose and something different for another." *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 67-68, 53 S.Ct. 278, 280, 77 L.Ed. 619 (1933). The phrase apparently became a legal term of art when the New York Code of Procedure of 1848 abolished the distinction between actions at law and

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[15] See footnote 11.

> suits in equity and simply required a plaintiff to include in his complaint "[a] statement of the facts constituting the cause of action...." 1848 N. Y. Laws, ch. 379, § 120 (2). By the first third of the 20th century, however, the phrase had become so encrusted with doctrinal complexity that the authors of the Federal Rules of Civil Procedure eschewed it altogether, requiring only that a complaint contains "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.Rule Civ.Proc. 8(a). See *Original Ballet Russe, Ltd v. Ballet Theatre, Inc.*, 133 F.2nd 187, 189 (CA2 1043). Nevertheless, courts and commentators have continued to use the phrase "cause of action" in the traditional sense established by the Codes to refer roughly to the alleged invasion of "recognized legal rights" upon which a litigant bases his claim for relief, *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 693,60 S.Ct. 1457, 1463, 93 L.Ed. 1628 (1949).

Davis v. Passman, supra at 237-38

The word from the trenches of civil litigation is that this message from the *Passman* case is being overlooked in favor of short term expediency and that the Civil trial is a vanishing and increasingly rare occurrence.[16] Counsel's research suggests the vanishing civil trial is not the result of negotiated settlements that reflect justice on the merits.

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[16] In a December, 2006, C. L. E. Seminar in Dayton, Ohio, where both Dayton Federal judges spoke, they acknowledged only three (3) civil trial between them in the proceeding 15 months. It is suggested this is indicative of what is occurring elsewhere in the Federal System.

The court has often emphasized that the District Courts should resist the temptation to place form over substance at the pleading stage because history has shown that the end result is to frustrate access to the courts and deny resolution of controversies on the merits.

Other rules addressing the sufficiency of pleadings has developed around the core Civ. R. 8(a) value of liberal pleading requirements to foster the overriding purpose of access to the Courts to resolve controversies on the merits F.R.C.P. 8(e)(1) and 8(f).

Meaningful accessibility to the federal judicial system is an essential component to the stability of our society. Requiring hyper-technical pleading requirements, *de jury* or *de facto*, denies access and has historically been frowned upon in the evolution of our judicial system. As discussed above, the instant case is one of the cases dismissed since the decision in the *Dura Pharmaceuticals* case and its emphasis on a complaint specifying an element of a cause of action, to wit; proximate cause and damages, as violating F.R.C.P. 8(a). When dismissing the instant case, the district court apparently read F.R.C.P. 8(a), as now requiring a predominately discrimination and retaliation complaint to specify, not only facts and allegations but also, legal theories of recovery and specifically state in the legal theory section which plaintiffs were asserting which theories of recovery. Even in those theories asserted by all Plaintiffs the district court required that formality to be specifically stated under the legal theories even if already stated in the individual's factual allegations.

In the instant case, in light of the foregoing, the district court required the Amended Complaint be drafted with what appears to be a specific requirement or formality not clearly

established and at odds with precedent in other Circuits. After dismissing all Defendants except one (BWXT) and allowing re-service on that Defendant's subsidiary (BWXTO), the district court held that the complaint failed to give "fair notice" despite the fact that individual factual allegations are separately presented in the body of the complaint and legal theories for recovery specifically identify which claims were not being asserted by the entire group and which individuals were asserting those theories. The District Court required too much formality for a notice pleading regardless of the complexity of the case.

II. The Sixth Circuit Has Fostered An Injustice And Has Not Ruled To Correct Same

The Circuit Courts of Appeals have authority to accept a late filing of a petition for rehearing, which ought to be granted when there is sufficient reason for doing so. *Young v. Harper* (1997), 520 U.S. 143. When circumstances suggest that an injustice would otherwise be committed, Courts of Appeals should avoid "overly technical reliance on the time requirements for filing a petition for rehearing." *United States v. Middlebrooks,* 624 F.2d 6 (C.A.5, 1980).

Even after a mandate has been issued, a United States Circuit Court has authority to avoid injustice and/or unfairness by recalling a mandate so as to allow a rehearing or, as a practical matter, the possibility of further appeal. See *Iverson v. Commissioner of Internal Revenue,* 257 F.2d 408 (C.A. 8, 1958). The mandate should be recalled when there is good cause, which means "the showing of the need to avoid injustice" *Greater Boston Television Corp. v. F.C.C.,* 463 F.2d 268, 277 (C.A.D.C. 1972); *Gradsky v. United States,* 376 F.2d 973, 995 (C.A.5, 1967).

Courts of Appeals have inherent authority to avoid or correct an injustice even to the point of recalling a mandate so as to rule on the merits of a petition for rehearing. *Greater Boston Television Corp. v. F.C.C., supra.*

The Supreme Court has emphasized the principle, not to rigidly apply rules if to do so results in departure of the duty of all courts to avoid injustice. E.g. *Johnson v. Jones,* 515 U.S. 571 (1981); *California v. Superior Court of San Bernardino County,* 482 U.S. 400 (1987); *Yturbide's Executors and Heirs v. United States,* 63 U.S. 290 (1859) (court may relax or suspend its own rules to avoid an injustice). This principle includes situations where the injustice grows out of technical application of rules of procedure. *Id.*; *Gaca v. United States,* 411 U.S. 618 (1973).

Indeed, the fundamental principle upon which all rules are promulgated rests on the objective of promoting, not avoiding, the administration of the substance of justice. C.f. *United States v. Bennett,* 232 U.S. 299, 308 (1914) ("we think it proper to observe that nothing in our reply to these questions is to be so construed as to deprive the court below of the power to take such steps as it may deem necessary to avoid injustice if it should be deemed that by some mistake of fact such a result might occur. The answers to the questions will be certified in accordance with the directions above given."); *Honor v. Henning,* 93 U.S. 228 (1876).

In the instant case, as the Court can discern from the substantive reasons for granting the Writ in Part I, this case has some merit. However, absent exercise of inherent powers that merit and the substantive issues associated with petitioners efforts to have the merits of their claims heard may not be addressed. Even, assuming, *arguendo*, that Petitioners' are not successful on the merits of their case, the issues raised

in this Petition ought to be addressed to avoid the confusion of what appears to surround F.R.C.P. 8(a). Otherwise, the district and circuit court resources will be unnecessarily be expended awaiting another case to address the issues raised in Part I.

Counsel was in transit literally to the other side of the world when the Sixth Circuit issued its decision. After a grueling thirty (30) hour return flight a motion for rehearing was drafted that had some merit and ready to be filed on the day it was due. It would have been driven and filed on November 3, 2006, but in reliance upon representation from the court that a mail filing would be accepted, it was mailed. The filing was then rejected *instanter*. Though a second motion for reconsideration in light of the circumstances was filed, it has not been ruled upon in time to save any possibility of petitioning this Court. So this Petition is being brought before this Court in the prayer that justice will be bestowed.

CONCLUSION

For the foregoing reason, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-4181

[Filed February 2, 2007]

GEORGE NAFZIGER et al., Plaintiffs-Appellants,	)
v.	)
MCDERMOTT INTERNATIONAL, INC. et al., Defendants-Appellees.	)

MOTION FOR RECONSIDERATION OF THE DECISION DENYING LEAVE TO FILE A MOTION FOR RECONSIDERATION OUT OF TIME.

Appellants respectfully request this Honorable Court to reconsider the decision denying Appellants earlier request for leave to file a petition for reconsideration out of time, and motion to file the petition instanter. The reasons for this motion are that Appellants were told verbally by someone in the Clerk's Office that as long as the motion was in the mail on the date the petition was due than it would be accepted, and simply to throw in a motion to file it instanter.

Counsel was prepared to drive the petition down to Cincinnati and personally file this, but based on the representations made to co-Counsel, Shawn Hooks, that it would be okay to mail it chose to do that instead. As it stands the petition was received by the Clerk's office one day late. Counsel was informed of such by the Clerk's office and was told to file a motion for leave, which was immediately done. Appellants are currently finalizing a petition for cert with the United States Supreme Court.

The undersigned Counsel later spoke with John Gallagher of Becker & Gallagher Publishing in preparation for filing a petition for a writ of certiorari. At that time the petition was on track for completion by January 15, 2007, plenty of time to timely file it with the United States Supreme Court. Mr. Gallagher informed Counsel that there was no rush because the petition was due on February 14, 2007. On today's date Mr. Gallagher informed Counsel that the petition is currently out of time unless the Court rules on the merits. Due to the Court's decision denying the motion for leave, rather than denying the motion for reconsideration this would adversely affect the ability to timely file the petition for certiorari. In light of the circumstances Counsel prays for relief from this Honorable Court. For all these reasons as well as those stated in the initial motion for leave the Appellants respectfully request this Honorable Court to reconsider its decision denying Appellants leave to file their petition for reconsideration out of time.

Respectfully submitted,

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ATTORNEY FOR THE APPELLANTS
GEORGE NAFZIGER, et al.

STATE OF OHIO)
) SS.
COUNTY OF MONTGOMERY)

I, John J. Scaccia, after being duly cautioned and sworn according to law, hereby deposes and says the following:

1. I am an attorney licensed to practice law in the State of Ohio, and am in good standing. I am also licensed to practice in the United States District Court for the Southern District of Ohio, The United States Court of Appeals for the Sixth Circuit, The United States Supreme Court and am in good standing in each of those Courts as well.

2. I am Lead-Counsel for the Plaintiffs in the case *Nafziger v. McDermott*, Case No. 05-4181.

3. On November 6, 2006 I was preparing to personally drive the motion for reconsideration in the above referenced case to Cincinnati. My Associate, Shawn Hooks, informed me that he had just spoke with someone in the Clerk's Office regarding a petition for reconsideration and was told that it would be accepted by mail so long as it was mailed that day and it was accompanied with a motion to file the petition instanter. When I inquired whether he was sure he said that he was.

4. Mr. Hooks has been with my office approximately eleven months and I have found him to be both extremely honest and meticulous for details.

5. I subsequently was preparing to file a petition for a writ of certiorari anticipating and on track for

completion by January 15, 2007. Prior to that date I spoke with Mr. John Gallagher of Becker & Gallagher Publishing who indicated that the filing date in the Supreme Court a due date of February 14, 2006. I asked if he was sure. He said that he would check to be sure and would get back with me. He spoke with me a second time, indicated that his information was correct and that we had until February 14, 2007 to file. Mr. Gallagher, by reputation and in my discussions with him appeared to be very knowledgeable in this respect.

6. Today, February 2, 2007, I received a phone call from Mr. Gallagher. He told my he had just took a second look at the case and saw that the Court had overruled the motion to file instanter and that he checked further and unless this Court would reconsider and rule on the merits we were out of time unless the Court rules on the merits.

FURTHER AFFIANT SAYETH NAUGHT.

/s/_____

Sworn to and subscribed in my presence on this 2nd day of February, 2007.

/s/_____
Notary Public

STATE OF OHIO)
) SS.
COUNTY OF MONTGOMERY)

I, Shawn P. Hooks, after being duly cautioned and sworn according to law, hereby deposes and says the following:

1. I am an attorney licensed to practice law in the State of Ohio, and am in good standing. I am also licensed to practice in the United States District Court for the Southern District of Ohio and The United States Court of Appeals for the Sixth Circuit, and am in good standing in each of those Courts as well.

2. I am co-Counsel for the Plaintiffs in the case *Nafziger v. McDermott*, Case No. 05-4181.

3. I personally spoke with someone in the Clerk's Office regarding a petition for reconsideration on November 6, 2006. I was told that it would be accepted as long as it was mailed that day, but to include a motion to file the petition instanter with the petition.

4. I communicated this to John Scaccia, and rather than driving the petition to be filed in person he chose to file it by mail.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ _____

Sworn to and subscribed in my presence on this 2nd day of February, 2007.

/s/ _____
Notary Public

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-4181

[Filed November 16, 2006]

GEORGE NAFZIGER et al.,)
Plaintiffs-Appellants,)
)
v.)
)
MCDERMOTT INTERNATIONAL, INC. et al.,)
Defendants-Appellees.)

Before: GUY, GILMAN, and ROGERS, Circuit Judges.

ORDER

Upon consideration of the appellant's motion to file a petition for rehearing instanter.

It is ORDERED that the motion be and it hereby is DENIED.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-4181

[Filed November 7, 2006]

GEORGE NAFZIGER et al., Plaintiffs-Appellants,	)
v.	)
MCDERMOTT INTERNATIONAL, INC. et al., Defendants-Appellees.	)

MOTION FOR LEAVE TO FILE A MOTION TO RECONSIDER OUT OF TIME

Pursuant to FRAP 40, a party is entitled to file a petition for panel rehearing if it is done so within 14 days after entry of judgment. FRAP 40(a)(1). The contents of the petition "must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition." FRAP 40(a)(2). The purpose of a petition for rehearing is to direct the court's attention to some material matter of law or fact which it has overlooked in deciding a case, and which, had it been given consideration, would probably have brought

about a different result. *National Labor Relations Board v. Brown & Root, Inc.* (C.A.8 1953), 206 F.2d 73.

The decision by the Court was entered into on October 20, 2006. Counsel for Plaintiffs left out of the county on a previously scheduled vacation on October 19, 2006. He did not return to the country until November 1, 2006 and to the office until November 2, 2006. At that time he was informed about the decision of the Court and spoke with his clients and conducted research on what steps to take. He filed the decision through Federal Express on the day of the deadline, but it was not received by the Court until the next business day. For these reasons the Plaintiffs respectfully request this Court grant him leave to file the motion for reconsideration out of time.

Respectfully submitted,

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APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-4181

[Filed November 6, 2006]

GEORGE NAFZIGER et al.,	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
MCDERMOTT INTERNATIONAL, INC. et al.,	)
Defendants-Appellees.	)
	)

MOTION TO RECONSIDER

Pursuant to FRAP 40, a party is entitled to file a petition for panel rehearing if it is done so within 14 days after entry of judgment. FRAP 40(a)(1). The contents of the petition "must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition." FRAP 40(a)(2). The purpose of a petition for rehearing is to direct the court's attention to some material matter of law or fact which it has overlooked in deciding a case, and which, had it been given consideration, would probably have brought about a different result. *National Labor Relations Board v. Brown & Root, Inc.* (C.A.8 1953), 206 F.2d 73.

I. THIS COURT OF APPEALS SHOULD RECONSIDER THE DECISION UPHOLDING THE OCTOBER 5, 2004 ORDER ("OCTOBER ORDER") DISMISSING THIS COMPLAINT

Initially, contrary to this Honorable Court's decision, Appellants did address the issue of identifying which claims were alleged by each of the Plaintiffs. This argument was set forth in Appellants' Brief at pages 16-17 and the accompanying footnotes:

> The twenty-eight (28) Plaintiffs (not including their spouses) each have separate individual claims unique to the individual's situation[1] as well as joint claims.

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[1] As set forth in footnote 6 of Appellants' brief: "The individual allegations of each Plaintiff are separately stated for each and compromises the bulk of the complaint, (pgs. 29 to 118, ¶¶ 184-1035). The length of each individual's allegations range from 6 pages for Plaintiff Eby to less than two pages for Plaintiff Koons.

The allegations for the primary individual Plaintiffs are set forth as follows: George Nafziger, pgs. 29-34 (¶¶ 184-35); Rick Christopher pgs. 34-7 (¶¶ 236-69); Mark Becker, pgs. 37-41 (¶¶269-04); Elias Spyrou, pgs. 41-4 (¶¶ 305-33); James England, pgs. 44-7 (¶¶ 334-56); Cynthia Eby, pgs. 47-53 (¶¶ 357-412); Carla Jendrek, pgs. 53-6 (¶¶ 413-45); Carol Robinson-Burkes, pgs. 56-60 (446-81); H. Kay Hurston, pgs. 60-4 (¶¶482-518); Albert Gibson, pgs. 64-6 (¶¶ 519-42); Josephine Watson, pgs. 66-9 (¶¶543-571); Shirley Barker, pgs. 69-72 (¶¶ 571-606); James McKnight, pgs. 72-7 (¶¶607-665); John Bruno, pgs. 77-81 (¶¶ 666-99); Cheryl Applegate, Pgs. 81-83 (¶¶ 700-14); Jerry Koons, pgs. 83-85 (¶¶ 715-24); Debbie Coons and Gary Coons, pgs. 85-8 (¶¶ 725-61); Paul Weinman, pgs. 89-90 (¶¶ 762-83); Tim Tayse, pgs. 90-2 (¶¶ 784-801); Carolyn Andrews, pgs. 92-96 (¶¶ 802-33); Gayle Jewett, pgs. 96-98 (¶¶ 834-55); Warren

> The joint claims come in two varieties: **The first variety involves claims shared with some, but not all, of the other Plaintiffs[2]. The Second variety involves claims alleged by all Plaintiffs.** Because of the joint claims Plaintiffs felt it preferable, less confusing and serving judicial economy to file one complaint rather than multiple (perhaps as many as 28) complaints.
>
> Although the Amended Complaint was long, consisting of 132 pages, it was outlined into particularized sections to facilitate Defendants' ability to understand the factual and legal issues and file an Answer.

Brief at 16-17 and corresponding footnotes (emphasis added).

Bowling, pgs. 99-101 (¶¶ 856-78); Larry Lamsa, pgs. 101-03 (¶¶ 879-95); Linda Hastings, pgs. 103-05 (¶¶ 895-917); Deborah Whittenhagen, pgs. 106-10 (¶¶ 918-61); Paula Niebal, pgs. 110-13 (¶¶ 962-93); Teresa Fox, pgs. 113-15 (994-1011); Vicki Fitzpatrick, pgs. 115-18 (¶¶ 1012-35)."

[2] **As set forth in footnote 7 of Appellants' brief: Examples of claims that are shared by some but not all Plaintiffs include, but are not limited to: Race Discrimination alleged by Plaintiffs Robinson-Burkes, Hurston, Watson, and Gibson, all of whom are Black; Sex Discrimination represented by female Plaintiffs Robinson-Burkes, Eby, Hurston, Watson, Coons, Andrews, Barker, Applegate, Jendrek, Niedal, Hastings, Fox, Jewett, Whittenhagen and Fitzpatrick; Disability Discrimination alleged by Plaintiffs McKnight, Koons, Applegate, Becker, Barker, England, Spyrou, Coons and Nafziger; National Origin Discrimination alleged by Plaintiff Spyrou."**

The above quoted passage make very clear that the issue of identifying which claims were alleged by which Plaintiffs was addressed in the brief. Where a cause of action did not specifically identify a particular plaintiff it is apparent that all Plaintiffs were alleging the claim. This is further suggested in Plaintiffs' two memoranda opposing Defendants' motions to dismiss pursuant to Civ. R. 8(a) therefore the issue has bee preserved. (See Doc 11 at pg. 2–4 and 11; Doc. 36 at 1–3.)

The first Memorandum (Doc. 11) specifically addressed Defendants' argument that each Defendant has not received notice of the claims against them. This argument has always been disingenuous. First, with regards to the Causes of Action Section, each cause of action specifies in the heading which Defendants are included or excluded. (Doc. 11 at pg. 11). Plaintiffs also set forth in Doc. 11 which paragraphs specifically identify the wrongs attributed to each applicable Defendant. Similarly Doc. 36 at pg. 3 states:

> Not only are the facts which infer liability specifically alleged for each Defendant but there is an added bonus of specificity; Plaintiffs identifying the causes that are attributed to each Defendant (Doc. 11pg 2-4, 11). However, Defendants choose to ignore factual allegations and instead focus exclusively on the cause of action section in forming their arguments hoping to prejudice the Court against Plaintiffs by the length of the Complaint. But examination of the law favors Plaintiff's Complaint.

The Court of Appeals, in affirming the October Order dismissing the Complaint, appears to have possibly focused on two allegations regarding the complaint: the alleged failure to identify which causes of action were alleged by the 28 individual Plaintiffs, and the alleged failure to identify which

cause of action was asserted against which Defendants. Although it appears that the first aspect was more controlling in the Court's decision, Appellants will err on the side of caution and addresses both of these aspects starting with the second because it helps to put the first into perspective.

This Honorable Court, in affirming the district court's October 5, 2004 order dismissing the amended ("original") complaint, erroneously stated that pursuant to the October order "BWXT and BWXTO are subsidiaries of the remaining two Defendants, McDermott International, Inc. (MII) and McDermott Incorporated (MI)," (Dec. pg.2). Actually, the October order dismissed MII and MI as well as all other Defendants except BWXT.

With only one defendant left (BWXT) after the district court dismissed all of the other Defendants, it is difficult to imagine how the Plaintiffs' Complaint should be dismissed on the basis that the Complaint "Fails to identify in violation of Rule 8...which individual plaintiffs were asserting various causes of action against which individual defendants." (Dec. at 1). Obviously and logically, with only one defendant left all claims were assert against that remaining Defendant. Though the district court permitted re-service of BWXTO this does not change the fact that there was only one defendant left and it was Plaintiffs' choice of whether or not to serve BWXTO.

Secondarily, if the focus of the decision shifts to the question of which claims were alleged by individual Plaintiffs, the result should still have been the same as argued above. The complaint did allege which of the named Plaintiffs were bringing which of the several causes of action.

This Court observed that "plaintiffs listed 24 separate causes of action, each based in part on violations set forth earlier [in the Complaint]. In only nine, however, did the Complaint specify which individual plaintiffs were bringing the respective causes of action." (Dec. at 2). However, the Court's characterization and emphasis is misplaced. Actually, the nine causes of action were specifically limited to the specific individual Plaintiffs, specifically set forth in each of those nine causes to the exclusion of all other Plaintiffs. For Plaintiffs to be required to state their 28 names in each of those 15 causes would amount to a ritualistic exercise placing form over substance, which goes contrary to the purpose of the civil rules, especially Civ. R. 8 CA which, unlike Civ. R. 9, does not have requirement of specificity

Until now no case has ever held that multiple plaintiffs must, pursuant to Civ. R. 8, specifically identify which individual Plaintiff is alleging a specific cause of action. This Court's reliance on *Juanita Theresa* Case (Dec. pg. 5, citing *Juanita Theresa Corp. v. U.S. Attorney*, No. 96-1706, 1997 WL 211247, at 1 (6th Cir. Apr. 28, 1997)(unpublished)), or any of the cases cited in the *Juanita Theresa* case is misplaced because the cases cited are clearly inapplicable.

The *Juanita Theresa* case involved a complaint that was "completely incomprehensible" and it this reason that the Court held the complaint "did not provide sufficient information to give the defendants fair notice of the claim or claims against them, and the court is not required to create a claim for them." *Id.* This Court never said that a cause of action must specify which causes are alleged by a given plaintiff against a given defendant in a multiparty case.

Similarly, the cases cited in the *Juanita Theresa* case do not impose such specificity. [3]

II THIS HONORABLE COURT SHOULD CONSIDER THE COMPUTER AND OTHER ISSUES ASSOCIATED WITH COMPUTER AND OTHER ISSUES ASSOCIATED WITH CONTROLLING EVENTS AND PERMIT FILING OF THIS AMENDED COMPLAINT OF ORDER A HEARING

With all respect to both this and the Honorable District Court, delays often occur for valid reasons and this case is not an exception. It is evident from the record that frictions developed with co-counsel around the time of the filing delays and that co-counsel was permitted to withdraw in early 2004.

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[3] In support of its holding the *Juanita Theresa* case cited three cases. Kuehl v. Federal Deposit Insurance Corp. (C.A.1, (1993) 8 F. 3d 905 involved "Failure to provide a short and plain statement of the claims as required by Rule 8 (a) (2)...{in that the pleading} was a verbose and redundant complaint" Id at 907. Similarly, Atkins v. Northwest Airlines, Inc. (C.A. 8, 1992), 967 F. 2d 1197 found violation of Civ. R. 8 (a) requirement of "a short and plaint statement of the claim showing the pleader is entitled to relief," Id at 1198, in that "nothing in the complaint remotely avers [to the issues in the claims for relief]" Id (emphasis added) set forth the amount in controversy sufficient to confer federal jurisdiction. Finally the Clark v. National Travelers Life Ins. Co. (C.A. 6, 1975) involved a diversity complaint which failed to set forth the amount in controversy sufficient to confer federal jurisdiction.

Neither this Honorable Court nor the District Court ever addressed the issues raised regarding "glitch[es] in the electronic notification" system PACER. (Appellants' brief at 12–13). These glitches occurred in October and November, 2004. Similarly, the reliance on opposing counsel's representations to Plaintiffs have been avoided. (Appellants' Brief at 12–14).

Instead, the focus of the decision is on prior delays, primarily around the time of Co-counsel's summary withdrawal of representation and the emergence of the undersigned's separate practice. Those delays were permitted without any finding of wrongdoing or indirect contempt (which would require a hearing in most instances).

Plaintiffs implore this Court to consider these issues and, if appropriate, even remand the case for an evidentiary examination minimally on the issues surrounding the events in October and November, 2004 or alternatively, all the relevant facts associated with the prior continuances mentioned by this Court.

For the above reasons Plaintiffs respectfully request this Honorable Court to reconsider its decision filed October 20, 2006.

Respectfully submitted,

/s/ _____

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APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-4181

[Filed October 20, 2006]

GEORGE NAFZIGER et al., Plaintiffs-Appellants,

v.

MCDERMOTT INTERNATIONAL, INC. et al., Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Ohio at Dayton. No. 04-00305 -Thomas M. Rose, District Judge.

Before: GUY, GILMAN, and ROGERS, Circuit Judges.

OPINION

RONALD LEE GILMAN, Circuit Judge. Twenty-eight former employees of BWX Technologies (BWXT) and BWXT of Ohio (BWXTO) brought suit against their employers and related corporations, alleging various contract- and discrimination-related causes of action. In response to two motions to dismiss brought by the defendants, the district

court held that (1) the plaintiffs' pleadings had failed to identify, in violation of Rule 8 of the Federal Rules of Civil Procedure, which individual plaintiffs were asserting various causes of action against which individual defendants, (2) the court lacked personal jurisdiction over five of the defendants, and (3) the plaintiffs, without good cause, had failed to serve process on one defendant, thus requiring dismissal of all claims against it under Rule 12(b)(5) of the Federal Rules of Civil Procedure. Subsequent to these dismissals, the district court denied the plaintiffs' motion for leave to file their amended complaint out of time, citing the standard for "excusable neglect" and finding that the standard had not been met. The plaintiffs appeal both this denial and the various pretrial dismissals enumerated above. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

A. Factual background

All of the plaintiffs worked for either BWXT or BWXTO between September of 1997 and the date of the events giving rise to this lawsuit. Earlier in 1997, the U.S. Department of Energy had awarded these two companies a general contract for the cleanup of the now-defunct federal superfund site at the Mound Facility in Miamisburg, Ohio. The site, originally constructed during World War II to assist the federal government in implementing the Manhattan Project and nuclear-weapons programs more generally, continued to operate as a manufacturer and worldwide distributor of stable isotopes until the end of the Cold War. When BWXT and BWXTO took over the Mound Facility, they immediately modified several of the contract-based employee-benefits packages, especially those relating to insurance. BWXT and BWXTO also effected several large-scale layoffs of Mound

Facility employees, including an Involuntary Separation Plan (ISP) in mid-2001 that directly affected all but one of the plaintiffs.

Both BWXT and BWXTO are subsidiaries of the remaining two defendants, McDermott International, Inc. (MII) and McDermott Incorporated (MI). BWXT and BWXTO are Delaware corporations with their principal places of business and headquarters in Lynchburg, Virginia. MII is a Panamanian corporation with both its principal place of business and corporate headquarters in New Orleans, Louisiana, and is the overall parent corporation of the three other defendants in this case. MI, a Delaware corporation, is the immediate subsidiary of MII and the direct parent corporation of BWXT and BWXTO.

B. Procedural background

The plaintiffs filed their initial complaint on May 22, 2003. A little more than one month later, but before the date on which the defendants' answer was due, the plaintiffs timely filed an amended complaint (hereinafter referred to simply as the "Complaint").

In their Complaint, the plaintiffs alleged three separate "groups" of violations, each having occurred respectively before, during, and after the June 26, 2001 ISP implemented by BWXT and BWXTO as part of a larger reduction in force at the Mound Facility. The alleged violations were all "in the nature of contract/estoppel, discrimination, retaliation, and tort." Many were either "collective to all . . . Plaintiffs" or "specific subgroups" thereof, or, alternatively, "individual in nature." At the end of their Complaint, the plaintiffs listed 24 separate causes of action, each based in part on the violations set forth earlier. In only nine, however, did the Complaint

specify which individual plaintiffs were bringing the respective causes of action.

1. Defendants' August 7, 2003 Motion to Dismiss

MII, MI, and BWXT filed a motion to dismiss the plaintiffs' Complaint on August 7, 2003. All three defendants alleged, among other things, (1) that the plaintiffs' pleadings violated Rules 8 and 9(b) of the Federal Rules of Civil Procedure, and (2) that 21 of the 24 causes of action pleaded by the plaintiffs failed, per Rule 12(b)(6) of the Federal Rules of Civil Procedure, to state a claim upon which relief could be granted. MII and MI also alleged (3) that the district court, per Rule 12(b)(2) of the Federal Rules of Civil Procedure, lacked personal jurisdiction over them.

The plaintiffs' response to the motion came in three installments, one for each of the grounds enumerated above, and only after having requested and been granted no fewer than four consecutive three-week extensions by the district court. In granting the last of those extensions on November 12, 2003, with a revised due date of November 16, 2003, the district court cautioned the plaintiffs, in uppercase type, that "NO FURTHER EXTENSIONS WILL BE PERMITTED." The plaintiffs nonetheless filed the first of their responses on November 17, 2003, one day after the final deadline had expired. On the same day, the plaintiffs requested two additional extensions for the remaining installments of their response. The district court, true to its word, did not grant either extension at that time. Undeterred, the plaintiffs filed-now without leave of court-the final two installments of their response on November 18 and November 24, 2003, respectively. After a telephonic hearing held on November 24, 2003, the district court retroactively accepted the plaintiffs' late responses *nunc pro tunc* .

2. Defendants' February 20, 2004 Motion to Dismiss

BWXTO and individual defendants Peyton Baker, Robert Bergin, and Rich Higgins, all officers and/or supervisors of the defendant companies, filed a motion to dismiss the plaintiffs' case against them on February 20, 2004. As in the August 7, 2003 motion to dismiss, all four defendants alleged, among other things, various Rule 8 pleading violations as well as the plaintiffs' failure to state a claim upon which relief could be granted. BWXTO also moved for dismissal, pursuant to Rule 12(b)(5) of the Federal Rules of Civil Procedure, for insufficient service of process. (Only BWXTO, together with MII, MI, and BWXT, remain in the case as defendants-appellees at this stage in the proceedings.)

Yet again, the plaintiffs' response came in multiple installments and in violation of the court-imposed deadlines. The four responsive memoranda ultimately filed on April 1, 2, 5, and 19, 2004, respectively, were each out of time and without leave of court. Although the plaintiffs had requested another extension two days before the initial deadline of March 13, 2004, the district court refused to honor the request.

3. Plaintiffs' April 9, 2004 Motion to Amend Complaint

On April 9, 2004, in the midst of filing the above-enumerated responses to the February 20, 2004 motion to dismiss, the plaintiffs moved to amend their Complaint to add another cause of action to the 24 already listed. The plaintiffs, after receiving an opposing memorandum filed by the defendants, filed a motion to request yet another extension on the very day that the plaintiffs' reply was due. True to its initial warning, the district court struck the motion, explaining that the motion not only lacked an accompanying

memorandum of law as required by the court's local rule, but also gave no reason whatsoever for the requested extension. The district court added a brief admonishment to the plaintiffs' counsel:

> Plaintiffs' counsel has previously advised the Court that he will mend his ways and discontinue his frequent requests for extensions of time within which to plead. He has not done so.
>
> This Court is entrusted with the responsibility "to secure the just, speedy, and inexpensive determination of every action," Federal Rule of Procedure 1. The granting of Plaintiffs' motion would not accomplish this.

4. District Court's October 5, 2004 Order regarding the defendants' motions to dismiss

After an August 20, 2004 transfer of venue from the Cincinnati Division to the Dayton Division, the district court handed down its order disposing of the defendants' two motions to dismiss on October 5, 2004. The district court first dismissed, with prejudice, MII and MI for lack of personal jurisdiction. In addition, the district court dismissed BWXTO for insufficient service of process, pursuant to Rule 12(b)(5) of the Federal Rules of Civil Procedure. Finally, pursuant to Rules 8(a)(2) and 8(e)(1), the district court dismissed BWXT because of the plaintiffs' failure "to identify [in their Complaint] which of the named Plaintiffs is bringing several of the Causes of Action." These last two dismissals were presumably with prejudice as well, because the district court did not specify that they were without prejudice. *See* FED. R. CIV. P. 41(b) ("Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any

dismissal not provided for in this rule . . . operates as an adjudication upon the merits.").

At the end of its order, however, the district court explicitly granted the plaintiffs 30 days to amend their Complaint to comply with the pleading requirements of Rule 8. The court also provided the following guideposts for compliance:

> If an amended complaint is submitted, the Defendants must be able to identify the cause of action, specifically which Plaintiffs are bringing the cause of action, specifically which Defendants the cause of action is against and specifically the grounds upon which the cause of action is based.

5. Plaintiffs' January 5, 2005 motion to accept their amended complaint out of time, and the district court's subsequent August 3, 2005 Order

The 30-day grace period granted by the district court on October 5, 2004 came and went without the submission of an amended complaint from the plaintiffs. They instead reverted to their old ways, requesting, and this time receiving, yet another extension. On November 4, 2004, the date on which the grace period was to expire, the district court granted the plaintiffs an unopposed extension until November 24, 2004.

Even this self-specified deadline, however, came and went without the submission of the plaintiffs' amended complaint. The pleading was not filed until November 26, 2004, two days late. Three days later, the district court struck the plaintiffs' amended complaint.

Finally, on January 5, 2005, more than five weeks after the district court's action, the plaintiffs formally moved the court for leave to file out of time or, alternatively, to accept their amended complaint *nunc pro tunc*. After extensive briefing by the parties, replete with multiple replies and sur-replies, the district court overruled the plaintiffs' motion and thereby terminated the litigation on August 3, 2005. This timely appeal followed, challenging both the October 5, 2004 Order granting the defendants' motions to dismiss and the August 3, 2005 Order denying the plaintiffs' motion to file an amended complaint out of time.

II. ANALYSIS

A. Dismissal of all defendants for plaintiffs' noncompliance with Rule 8

1. Standard of review

The district court determined that the plaintiffs' Complaint failed to comply with Rules 8(a)(2) and 8(e)(1) of the Federal Rules of Civil Procedure in that it did not put the defendants on notice as to which particular plaintiffs were asserting certain of the alleged causes of action. On that ground alone, the district court dismissed the plaintiffs' Complaint in its entirety. The court, however, gave the plaintiffs 30 days to cure the noted deficiency. We review such a dismissal under the abuse-of-discretion standard. *Janita Theresa Corp. v. United States Atty.*, 1997 U.S. App. LEXIS 9589, No. 96-1706, 1997 WL 211247, at *1 (6th Cir. Apr. 28, 1997) (unpublished); *Blake v. De Vilbiss Co.*, 118 F.2d 346 (6th Cir. 1941).

2. Discussion

In their brief, the plaintiffs set forth in considerable detail several justifications for the length, complexity, wording, and overall organization of their Complaint, arguing that it was "as reasonably articulate and concise as Plaintiffs could get under the complex circumstances and facts of the case." These justifications, however, do not address the basis for the district court's decision. As the defendants note in their brief, the district court explicitly limited its finding of Rule 8 error to the single fact that "the specific Plaintiffs that [a]re bringing certain claims cannot be determined." Elsewhere in its order, moreover, the district court considered both length and complexity as nonissues, noting that "Plaintiffs are entitled to bring forward a lengthy complaint, particularly where it involves multiple plaintiffs, multiple defendants and multiple causes of action." The court also acknowledged that the 132-page Complaint, despite requiring the defendants to constantly cross-reference one section with another without any guidance, "arguably sets forth whatever grounds are available for each claim."

Nor does the plaintiffs' legal analysis focus on the basis for the district court's disposition. All of the cases cited by the plaintiffs discuss the length and complexity of complaints, precisely the two issues that the district court had already resolved in the plaintiffs' favor. The plaintiffs also attempt to convert the district court's Rule 8 dismissal into a Rule 12(b)(6) dismissal for failure to state a claim, presumably because the latter would afford them a more favorable de novo review by this court. *See Dugan v. Brooks,* 818 F.2d 513, 516 (6th Cir. 1987) ("Whether the district court correctly dismissed Dugan's claims pursuant to Fed.R.Civ.P. 12(b)(6) is a question of law subject to *de novo* review."). But the plaintiffs would be unlikely to prevail even under that

standard of review because the district court relied on basic reading comprehension more than its discretion in finding that several of the plaintiffs' claims failed to identify the specific plaintiffs bringing them.

The plaintiffs' Complaint "simply does not provide sufficient information to give the defendants fair notice of the claim or claims against them, and the court is not required to create a claim for [the plaintiffs]." *Janita Theresa Corp.*, 1997 U.S. App. LEXIS 9589, 1997 WL 211247, at *1 (quotation marks omitted). Finally, the plaintiffs make no mention of the fact that the district court's Rule 8 dismissal of their Complaint was *conditional*, granting them 30 days' leave to amend in order to comply with the pleading requirements of Rule 8. This was a benevolent exercise of the district court's discretion, not an abuse thereof. We therefore uphold the district court's dismissal of the plaintiffs' Complaint for failure to comply with the pleading requirements of Rule 8.

B. Dismissal of MII and MI for lack of personal jurisdiction

Because we affirm on other grounds, we need not reach the comparatively closer issue of whether the district court had personal jurisdiction over MII and MI. Defense counsel argues to the contrary, contending at oral argument that because the dismissal of MII and MI for lack of personal jurisdiction was with prejudice, disposition of the issue on appeal is necessary to ensure the preclusive, res judicata effect of that dismissal. That argument is misplaced, however, because this circuit's caselaw instructs that even if the district court had been correct in concluding that it lacked personal jurisdiction over MII and MI, the court's dismissal on that ground should have been without, not with, prejudice. *See Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005)

("dismissals for lack of personal jurisdiction should be made 'without prejudice'"). In any event, the Rule 8 dismissal of MII, MI, and the other two remaining defendants-which we have already reached and decided in their favor in Part II.A. above– *was* with prejudice, albeit by default. *See* FED. R. CIV. P. 41(b) ("Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule . . . operates as an adjudication upon the merits.").

C. Dismissal of BWXTO for insufficient service of process

1. Standard of review

The plaintiffs failed to serve process on BWXTO within the 120-day time frame required by Rule 4(m) of the Federal Rules of Civil Procedure. Concluding that the plaintiffs had failed to demonstrate good cause for missing this deadline, the district court dismissed BWXTO pursuant to Rule 12(b)(5) for insufficient service of process. We review such dismissals under the abuse-of- discretion standard. *Byrd v. Stone*, 94 F.3d 217, 219 (6th Cir. 1994).

2. Discussion

None of the parties disputes the facts surrounding the plaintiffs' attempted service of process on BWXTO. The district court's opinion provides a summary of the relevant details:

> Plaintiffs' original Complaint was filed on May 22, 2003. Plaintiffs Amended Complaint was then filed on June 26, 2003. In spite of an alert from Defendants less than five weeks after the Amended Complaint was filed that service had not been perfected, Plaintiffs did

> not attempt to perfect service until they requested the Clerk to issue a summons and the Amended Complaint on December 31, 2003. Further, Plaintiffs did not request nor obtain leave of Court to extend the time period during which service must be completed.

Rule 4(m) of the Federal Rules of Civil Procedure requires completion of service of process within 120 days after filing of the complaint. FED. R. CIV. P. 4(m). Dismissal of the action "shall" follow unless the "plaintiff shows good cause" for failure to meet the 120-day deadline. *Id.* The plaintiffs, who waited more than half a year before attempting to serve BWXTO, plainly failed to meet that deadline here. Accordingly, the issue is whether the plaintiffs showed good cause for their failure and, more specifically, whether the district court abused its discretion in concluding that they had not.

We are reluctant to disturb a district court's "discretionary determination" of whether good cause has been shown. *Friedman v. Estate of Presser*, 929 F.2d 1151, 1157 (6th Cir. 1991) (citation omitted). Establishing good cause is the responsibility of the party opposing the motion to dismiss–here, the plaintiffs–and "necessitates a demonstration of why service was not made within the time constraints." *Habib v. GMC*, 15 F.3d 72, 73 (6th Cir. 1994). To be sure, the district court's order misleadingly suggests that the plaintiffs made no such demonstration whatsoever, because the order does not explicitly mention any of the several reasons for the delay set forth by the plaintiffs in their April 5, 2004 memorandum opposing the defendants' motion to dismiss. That omission alone, however, does not render the district court's decision incorrect. The omission speaks as much, if not more, to the inadequacy of the reasons given by the plaintiffs as to the court's failure to discuss those reasons.

Three principal justifications–collectively meant to establish good cause–are put forth by the plaintiffs to explain their failure to serve BWXTO within the required 120-day window. First, "[s]tarting in late July [of 2003], discussions with Defense counsel ensued regarding service of process. . . . As Counsel recalls, a variety of topics were discussed including waiver of service by BWXTO." The plaintiffs concede, however, that "it became apparent that the issues regarding service would not be resolved amicably." Second and third, "significant personal matters involving the welfare of Counsel's young children caused Counsel substantial problems, and then co-counsel was not providing assistance."

These reasons, taken either individually or as a whole, hardly compel a finding of good cause. As the district court explicitly noted in its order, "Plaintiffs did not request nor obtain leave of Court to extend the time period during which service must be completed." The plaintiffs' counsel should have taken the simple step of requesting an extension of time from the court if his children's welfare had truly affected his ability to serve process. After all, as the past procedural history of this case makes clear, he certainly knew how to request more time.

This court's decision in *Habib*, on which the plaintiffs rely for the proposition that "[s]ignificant personal matters are matters which the Court can consider," is easily distinguished from the facts of this case. There, this court reversed the district court's dismissal on the basis that the district court, in its good-cause inquiry, had abused its discretion "by failing to consider all of Mr. Habib's medical claims, as well as his reasonable and diligent efforts to complete service *pro se* ." *Habib*, 15 F.3d at 75. Unlike here, the relevant "significant personal matters" in *Habib* were personal to the plaintiff

himself and, in both kind (medical) and degree (paralysis), far more serious than the unspecified, though surely unfortunate, "welfare" matters that befell the children of the plaintiffs' counsel. The *Habib* plaintiff, moreover, unlike the numerous plaintiffs here, was *pro se*, thus requiring this court to construe Rule 4 "leniently." *Id.* at 74. We therefore hold that the district court did not abuse its discretion in dismissing BWXTO for insufficient service of process.

D. The district court did not abuse its discretion in denying the plaintiffs' motion to file an amended complaint out of time

1. Standard of review

Rule 6(b) of the Federal Rules of Civil Procedure provides that when a party moves the court to accept a filing after the relevant deadline, the court may do so "where the failure to [file before the deadline] was the result of excusable neglect." FED. R. CIV. P. 6(b). We review a district court's determination of excusable neglect, or lack thereof, under the abuse-of-discretion standard. *Turner v. City of Taylor*, 412 F.3d 629, 649 (6th Cir. 2005). Such abuse exists if the district court "relie[d] on erroneous findings of fact, applie[d] the wrong legal standard, misapplie[d] the correct legal standard when reaching a conclusion, or ma[de] a clear error of judgment." *Reeb v. Ohio Dep't of Rehab. and Corr.*, 435 F.3d 639, 644 (6th Cir. 2006). Here, the governing legal standard for excusable-neglect determinations is a balancing of five principal factors: (1) the danger of prejudice to the nonmoving party, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, (4) whether the delay was within the reasonable control of the moving party, and (5) whether the late-filing party acted in good faith. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs.*

Ltd. P'ship, 507 U.S. 380, 395, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993).

2. Discussion

As their respective briefs make clear, both parties agree that the district court applied the proper legal standard in evaluating the issue of excusable neglect. In its 10-page order, the district court methodically applied each of the five *Pioneer* factors to the relevant facts of the case before it, concluding that each factor weighed in favor of the defendants. The plaintiffs simply contend that the court's conclusion was wrong.

In their brief, the plaintiffs cite five cases that purportedly demonstrate the error of the district court's conclusion. Two distinct problems plague their attempt. First, all five cases are district court opinions, albeit from courts within this circuit, and thus lack precedential weight in this court. Second, the district court's excusable-neglect analysis necessarily encompassed at least two, not one, instances of neglect: *both* the "two day inadvertent mistake" regarding the November 24, 2004 deadline *and* the subsequent 37-day delay in filing the motion to accept the late-filed amended complaint. The district court, in accordance with *Pioneer* 's command, properly considered these last two instances of neglect not in isolation, but by "taking account of all relevant circumstances surrounding the party's omission." *Pioneer*, 507 U.S. at 395. Included among the relevant circumstances as found by the district court were numerous instances of "previous dilatory conduct," accompanied by the court's "repeated warnings," which "insult[ed] the court's dignity" and "created a tortured process."

In their brief, however, the plaintiffs act as though their two-day delay in missing the November 24, 2004 deadline was the only instance of neglect at issue. The plaintiffs also failed to provide in their motion any reason whatsoever–much less one that could constitute a legally valid excuse–for the 37-day delay that followed on the heels of the 2-day delay. By relying on the five district-court opinions noted above, moreover, the plaintiffs appear to be arguing that because some district courts have found excusable neglect for a one- or two-day delay in filing, the district court here necessarily abused its discretion in failing to find excusable neglect. To accept the plaintiffs' argument would deprive the term "deadline" of much of its meaning. We decline to do so here.

Citing *Marks v. Shell Oil Co.*, 830 F.2d 68 (6th Cir. 1987), and *Ellison v. Ford Motor Co.*, 847 F.2d 297 (6th Cir. 1988), the plaintiffs further observe that "[t]his Court has already determined that a district court abuses its discretion when it fails to consider a pending motion to amend a complaint and terminates litigation by deciding a motion for summary judgment adverse to the party whose motion to amend the complaint is pending." In *Marks* and *Ellison*, however, this court made clear that requiring the district court to "evaluate the pending motion" prior to granting summary judgment "is not to say that the court [i]s required to grant plaintiff's motion." *Ellison*, 847 F.2d at 301 (discussing the holding in *Marks*). Here, of course, the district court not only evaluated the plaintiffs' November 4, 2004 motion for a 20-day extension to amend their complaint, but *granted* it as well. The cited cases simply do not support the further proposition that the district court was then required to accept the amended complaint two days after the deadline specified by the plaintiffs themselves had lapsed.

Finally, the plaintiffs cite *Johnson v. Ventra Group, No. 96-1463*, 1997 U.S. App. LEXIS 21714 (6th Cir. Aug. 13, 1997) (unpublished), for the proposition that "a district court abuses its discretion when it fail[s] to weigh the cause for delay when refusing to allow a plaintiff to file an amended complaint pursuant to Fed. R. Civ. P. 15(a)." Unfortunately for the plaintiffs, this legal principle is inapposite here. The district court addressed the "cause for delay," one of the five key factors under the *Pioneer* analytic framework, in no uncertain terms:

> The third factor to be considered is the reason for the delay. The stated reason for the delay is that Plaintiffs' Counsel was under the mistaken impression that the amended complaint was due on November 25, 2004 instead of the Court-ordered date of November 24, 2004. . . . The only reasons given for thinking that he had until November 25th are that one of his secretaries also failed to understand that the amended complaint was due not later than November 24th and that Defendants' Counsel allegedly agreed to an extension beyond November 24, 2004.

In finding counsel's proffered excuses unpersuasive, the district court also noted that "this is not the first time that Plaintiffs' Counsel has ignored the orders of this Court."

To his credit, the plaintiffs' counsel, in his final memorandum submitted to the district court on behalf of his clients, asked the court to lay blame for the various procedural gaffes where it ought to lie-with himself. "Assuming, arquendo [sic], that a punishment should be impopsed [sic] for this one day [sic] error then it should fall on Counsel and not on the Clients or the Merits of this case." But the Supreme Court explicitly rejected a similar argument

in *Pioneer*, holding that clients must "be held accountable for the acts and omissions of their chosen counsel." 507 U.S. at 396-97. The *Pioneer* Court reaffirmed what amounts to an agency- and choice-based rule of imputation, as first explained by the Court in *Link v. Wabash R.R. Co.*, 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962):

> Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney.

Id. at 633-34 (quotation marks omitted).

This court expressly adopted the above rule in the analogous civil case of *Allen v. Murph*, 194 F.3d 722, 723-24 (6th Cir. 1999) (citing *Pioneer* as grounds for upholding the district court's finding of inexcusable neglect even though the neglect was due solely to the "carelessness of these attorneys" and even though the clients themselves had acted "promptly and diligently"). Nor do the possible pitfalls of "the cyberworld"–to which the plaintiffs' counsel here attributed his "sins" for the first time during oral argument–enhance his position.

In light of the governing abuse-of-discretion standard of review, the plaintiffs' reliance on the "elastic" and "at bottom . . . equitable" nature of the excusable-neglect standard is misplaced. *See Pioneer*, 507 U.S. at 392, 395. For even if another district court on these facts might have determined

that equity tipped in the plaintiffs' favor, we must refrain from doing so unless we can say with "a definite and firm conviction" that this particular district court "committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." *Huey v. Stine*, 230 F.3d 226, 228 (6th Cir. 2000). The record in the present case, as set forth and analyzed above, falls well short of establishing that the district court "relie[d] on erroneous findings of fact, applie[d] the wrong legal standard, misapplie[d] the correct legal standard when reaching a conclusion, or ma[de] a clear error of judgment." *See Reeb*, 435 F.3d at 644.

Taking all of the relevant circumstances into account in the case before us, "a fair-minded judge could easily find that the carelessness of [plaintiffs'] attorneys in allowing the [20]-day period to run was inexcusable." *See* Allen, 194 F.3d at 724. We therefore hold that the district court did not abuse its discretion in rejecting the plaintiffs' late-filed amended complaint, thereby terminating the entirety of the litigation.

III. CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court.

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Case No. 3-:04-CV-305

[Filed August 3, 2005]

GEORGE NAFZIGER, et al.,
Plaintiffs,

-vs -

MCDERMOTT INTERNATIONAL, INC., et al.,
Defendants.

ENTRY AND ORDER OVERRULING PLAINTIFFS' MOTION FOR LEAVE TO FILE OUT OF TIME OR ALTERNATIVELY ACCEPT LATE FILING *NUNCPRO TUNC[O]* (Doc. #61) AND TERMINATING THE CASE

These causes of action arise from and relate to the former employment of certain of the Plaintiffs at the federal Mound Facility in Miamisburg, Ohio. The remaining Plaintiffs are spouses of the employee-Plaintiffs.

Now before the Court is Plaintiffs' Motion for Leave To File Out of Time Or Alternatively Accept Late Filing *Nunc*

Pro Tunc[o]. (Doc. #61.) This Motion is now fully briefed including Sur-Replies by both the Plaintiffs and the Defendants. A procedural background will first be set forth followed by the standard of review and an analysis of the Motion.

PROCEDURAL BACKGROUND

This case was filed on May 22, 2003. (Doc. #1.) Within five weeks the original Complaint was amended. (Doc. #3.) A Motion To Dismiss was then filed by Defendants McDermott International, McDermott Inc. and BWX Technologies. (Doc. #4.)

On December 31, 2003, which is several months later, service on Defendants BWXT of Ohio, Peyton Baker ("Baker"), Robert Bergin ("Bergin") and Rich Higgins ("Higgins") was attempted. (Doc. #27) Then, on January 30, 2004, service on Defendant Bergin was attempted. (Doc. #31.) In response, Defendants BWXT of Ohio, Baker, Bergin and Higgins filed their Motion To Dismiss. (Doc. #32.) Before the Motions To Dismiss were fully briefed, the Plaintiffs filed another motion to amend their complaint. (Doc. #42.)

In an Entry and Order entered on October 5, 2004 (the "Order"), this Court granted both pending Motions To Dismiss. Defendants McDermott International, McDermott Inc., Baker, Higgins and Bergin were dismissed with prejudice for lack of personal jurisdiction. Defendant BWXT of Ohio was dismissed for insufficient service of process. The Amended Complaint against Defendant BWX Technologies was dismissed because the Court was unable to identify which of the named Plaintiffs was bringing several of the Causes of Action. Plaintiffs were then given until not later than thirty

(30) days following entry of the Order to submit an amended complaint that satisfies the requirements of Rule 8. Plaintiffs' then-pending motion to amend their Amended Complaint (doc. #42) was rendered MOOT by the granting of leave of Court to file an amended complaint.

The Motion for leave to file out of time that is now before the Court must be reviewed in light of several admonitions in the Order that were directed to the Plaintiffs. The Plaintiffs had disregarded the Local Rules of Civil Procedure and the required approvals of the Court several times. In the Order, the Court repeatedly recognized that Plaintiffs' conduct created a "tortured process" that is"offensive to the dignity and power of this Court and its rules of procedure" (Doc. #59.) The Court warned Plaintiffs at least six times in the Order that "future occurrences" would "not be tolerated." (*Id.*)

Following entry of the Order requiring an amended complaint to be filed not later than thirty (30) days from October 5, 2004, Plaintiffs filed a Motion for Extension of Time to submit an amended complaint. This motion was struck because it was not submitted in the correct format. Plaintiffs then resubmitted their Motion for Extension of Time in the proper format and it was granted specifically extending the deadline for submitting an amended complaint to November 24, 2004. (Doc. #60).

Then, on November 26, 2004, two days after the Court-ordered deadline, Plaintiffs filed an amended complaint. This amended complaint was struck on November 29, 2004, because it was filed out of time without leave of court. Thirty-seven (37) days later, on January 5, 2005, Plaintiffs filed their Motion for Leave To File Out of Time Or Alternatively Accept Late Filing Nunc Pro Tunc[o]. (Doc. #61.) It is this

Motion that is now fully briefed, including Sur-Replies by both Parties, and before the Court.

STANDARD OF REVIEW

Plaintiffs' Motion to file out of time is presumably brought pursuant to Fed.R.Civ.P. Rule 6(b). Rule 6(b) provides that, if the motion for an extension of time is made after the expiration of the time to file, the court, for good cause shown, may, in its discretion, permit the "act to be done where the failure to act was the result of excusable neglect."

In this case, the Motion for an extension of time was filed forty-two (42) days after the expiration of time to file an amended complaint. The Court must, therefore, determine if the failure to file an amended complaint by November 24, 2004, as required by this Court's Order, was the result of "excusable neglect."

The definition of "excusable neglect" and the analysis factors used in the Sixth Circuit are found in the Supreme Court case *of Pioneer Investment Services Company v. Brunswick Associates Limited Partnership. Deym v. von Fragstein,* 127 F.3d 1102, 1997 WL 650933 at **1 (6th Cir. Oct. 16, 1997). In *Pioneer,* the Supreme Court announced a "flexible understanding of 'excusable neglect.'" 507 U.S. 380, 389 (1993). In doing so, the Court recognized that, "[t]here is, of course, a range of possible explanations for a party's failure to comply with a court-ordered filing deadline." *Id.* at 387. At one end of the spectrum, a party may be prevented from complying with the deadline by forces beyond its control. *Id.* At the other end, a party simply may choose to flout a deadline. *Id.* In between are cases where Courts may accept late filings where the failure to act was the

result of excusable neglect. *Id.* The determination of whether the neglect is excusable is an equitable one "taking account of all relevant circumstances surrounding the party's omission." *Id.* at 395.

Several factors are to be considered when determining whether the party's failure to comply with a court-ordered deadline is excusable neglect. They are: (1) the danger of prejudice to the non-moving party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; (4) whether the delay was within the reasonable control of the late party; and (5) whether the late party acted in good faith. *Deym,* 1997 WL 650933 at **1. Finally, an attorney's inexcusable neglect is normally attributed to his or her client. *Allen v. Murph,* 194 F.3d 722, 723 (6th Cir. 1999).

By way of example, the misreading of a rule or statute is not excusable neglect. *Deym,* 1997 WL 650933 at **2 (citing *Duncan v. Washington,* 25 F.3d 1047, 1994 WL 232397 at **3 (6th Cir. 1994)). Also, a lawyer's miscalculation of time in which notice of appeal must be filed is not excusable neglect. *Id.* (citing *Kyle v. Campbell Soup Co.,* 28 F.3d 928, 931-32 (9th Cir. 1994), *cert. denied,* 513 U.S. 867 (1994)). Finally, excusable neglect can never be met by showing an inability or refusal to read and comprehend the plain language of the federal rules. *Id.* (citing *Prizevoits v. Indiana Bell Telephone Co.,* 76 F.3d 132, 133 (7th Cir. 1996)). Having set forth the standard of review, the analysis next turns to Plaintiffs' Motion.

MOTION FOR LEAVE TO FILE OUT OF TIME

In the Memorandum accompanying his Motion for leave to file out of time, Plaintiffs' Counsel argues that he was under the mistaken impression that the Amended Complaint

was due on November 25, 2004 instead of the Court-ordered date of November 24, 2004. He also argues that he instructed a secretary to check when the amended complaint was to be filed and the secretary confirmed that it would not need to be filed until November 26, 2004.

Plaintiffs' Counsel also argues that the November 26th filing date was agreed to by opposing Counsel. However, opposing Counsel's alleged agreement is immaterial to this matter. It is the Court and not opposing Counsel that must approve extensions.

In his Reply Memorandum, Plaintiffs' Counsel argues that he requested an extension until November 25, 2004, to file the Court-ordered amended complaint. However, the Court's Notation Order granting an extension clearly grants the extension of time "through 11/24/04."

Also in his Reply Memorandum, Plaintiffs' Counsel argues that the amended complaint was not filed on time because he was exploring the possibility of settling the claims. However, this excuse was not mentioned in Plaintiffs' Motion and it is refuted by Defendants' Counsel.

Finally, Plaintiffs' Counsel offers no explanation as to why he waited for thirty-seven days after the amended complaint was struck to seek leave of Court to file an amended complaint beyond the Court-ordered deadline. Defendants oppose Plaintiffs' Motion and present arguments regarding the *Pioneer* factors.

One factor to be considered when determining if Counsel's failure to file the Court-ordered amended complaint on time is the danger of prejudice to the non-moving party. The

remaining Defendants argue that they are severely prejudiced by this and other delays protracted by the Plaintiffs.

The contract between the Department of Energy and Plaintiffs' former employer ended on January 1, 2003 and Plaintiffs' former employer has had no control over relevant documents and no longer has ready access to those documents. Further, most of the potential witnesses have moved from Ohio. The Plaintiffs' delay has therefore, according to the remaining Defendants, prejudiced their ability to defend themselves against these Plaintiffs.

This case was initially flied on May 22, 2003. It is now nearing the end of July 2005, more than two years later and, largely due to Plaintiffs' actions or lack thereof, a satisfactory complaint has yet to be filed. In the mean time, contractors have changed at the Mound Facility and the remaining Defendants' ability to defend themselves has become exceedingly more difficult. Therefore, this factor weighs in favor of the remaining Defendants.

The next factor to be considered is the length of the delay and its potential impact on the proceedings. As noted above, this case has been delayed many times by the Plaintiffs' dilatory conduct including last-minute requests for extensions. Specifically with regard to this Motion, after seeking and receiving one deadline extension, which they did not meet, the Plaintiffs waited for over thirty-seven (37) days to file a motion seeking leave of Court to file their amended complaint. Such delay significantly impacts the length of these proceedings and adds to the Court's workload thereby taking attention from matters which are being properly prosecuted. This factor, therefore, weighs in favor of the remaining Defendants.

The third factor to be considered is the reason for the delay. The stated reason for the delay is that Plaintiffs' Counsel was under the mistaken impression that the amended complaint was due on November 25, 2004 instead of the Court-ordered date of November 24, 2004. As an isolated incident, this mistake may not weigh in favor of the remaining Defendants. However, this is not the first time that Plaintiffs' Counsel has ignored the orders of this Court. In fact, the Court's Order issued on October 5, 2004, admonished Plaintiffs' Counsel for disregarding the Local Rules of Procedure and the required Court approvals and warned Plaintiffs' Counsel at least six times that future occurrences would not be tolerated. In light of this previous dilatory conduct and repeated warnings by the Court, Plaintiffs' stated reason for this delay is not acceptable. This factor weighs heavily in favor of the remaining Defendants.

The next factor to be considered is whether the delay was within the reasonable control of the Plaintiffs. It clearly was. The record indicates that Plaintiffs' Counsel was clearly ordered to file an amended complaint not later than November 24, 2004, and failed to do so because he thought that he had until November 25th. The only reasons given for thinking that he had until November 25th are that one of his secretaries also failed to understand that the amended complaint was due not later than November 24th and that Defendants' Counsel allegedly agreed to an extension beyond November 24, 2004.[1]

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[1] Defendants' Counsel argues that permission to file the amended complaint after November 24, 2004, was not granted nor was a later filing date acknowledged. However, this argument is immaterial because it is the Court and not opposing counsel that grants extensions to the Court's orders.

The final *Pioneer* factor to be considered is whether Plaintiffs acted in good faith. As noted above, Plaintiffs' Counsel has repeatedly failed to follow this Court's orders in the past and has been admonished for his failure to do so. In light of these failures, it can hardly be said that Plaintiffs' Counsel acted in good faith regarding the most recent failure to file a Court-ordered amended complaint on time. This factor weighs heavily in favor of the remaining Defendants.

In addition to discussing the *Pioneer* factors, the Defendants argue that the proposed amended complaint should not be permitted because it does not comply with the Order. However, since the proposed amended complaint was struck, the Court does not have a copy to review. Nor is it necessary for the Court to review the proposed amended complaint.

CONCLUSION

In a prior Order, this Court admonished the Plaintiffs for several times disregarding the Local Rules of Court and the required approvals of the Court. The Court repeatedly recognized that Plaintiffs' Counsel's conduct created a "tortured process" that is "offensive to the dignity and power of this Court and its rules of procedure." Finally, the Court warned Plaintiffs at least six times in the prior Order that "future occurrences" would "not be tolerated."

Yet, Plaintiffs' Counsel has now once again disregarded the orders of this Court by failing to file an amended complaint by the deadline established by the Court. As a further insult to the dignity of this Court, Plaintiffs' Counsel then filed the amended complaint out of time without leave to file out of time. Then, to even further insult the Court's dignity, when the amended complaint was struck, Plaintiffs'

Counsel waited for thirty-seven (37) days to seek leave of Court to file the amended complaint out of time.

All of the factors to be consider in deciding whether to grant an extension of time pursuant to Rule 6(b) weigh heavily in favor of the remaining Defendants. The remaining Defendants will be prejudiced by further delay and the length of the delay significantly impacts these proceedings. The delay was within the total and reasonable control of Plaintiffs' Counsel and Plaintiffs' Counsel has offered no acceptable reason for the delay. Finally, based upon his prior actions in this matter and the delay in seeking leave of Court to file out of time, the Court is unable to conclude that Plaintiffs' Counsel acted in good faith with regard to the issue that is now before the Court.

Plaintiffs have offered no argument for accepting late filing of their amended complaint beyond the arguments offered for leave of Court to file out of time. Therefore, the request for late filing of an amended complaint *nunc pro tunc* is treated the same as the motion for leave to file out of time.

Plaintiffs' Counsel's failure to comply with the Court-ordered deadline for filing the amended complaint is not excusable neglect. Further, Plaintiffs' Counsel's inexcusable neglect is attributed to his clients. Therefore, Plaintiffs' Motion for Leave To File Out of Time Or Alternatively Accept Late Filing *Nunc Pro Tunc[o]* is OVERRULED.

Since Plaintiffs' Complaint has been dismissed and may not be refiled, there are no issues to be adjudicated. The captioned cause is hereby ordered terminated upon the docket records of the United States District Court for the Southern District of Ohio, Western Division, at Dayton.

DONE and **ORDERED** in Dayton, Ohio, this Third day of August, 2005.

s/Thomas M. Rose
THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Case No. 3-:04-CV-305

[Filed October 5, 2004]

GEORGE NAFZIGER, et al.,	)
Plaintiffs,	)
	)
-vs-	)
	)
MCDERMOTT INTERNATIONAL, INC., et al.,	)
Defendants.	)
	)

ENTRY AND ORDER GRANTING PLAINTIFFS' MOTION FOR LEAVE TO FILE MEMORANDUM IN EXCESS OF TWENTY PAGES (Doc. #16); GRANTING PLAINTIFFS' MOTION FOR LEAVE TO FILE THE ATTACHED TABLE OF CONTENTS (Doc. #22); GRANTING PLAINTIFFS' MOTION FOR AN EXTENSION OF TIME TO FILE A RESPONSE TO DEFENDANTS' MOTION TO DISMISS (Doc. #34); GRANTING PLAINTIFFS' MOTION TO ALLOW THE FILING OR ACCEPTANCE OF PLAINTIFFS' REPLY MEMORANDUM (Doc. #49); OVERRULING PLAINTIFFS' MOTION FOR ORAL ARGUMENT (Doc. #50); GRANTING DEFENDANTS

MCDERMONT INTERNATIONAL, INC., MCDERMONT, INC. AND BWX TECHNOLOGIES, INC.'S MOTION TO DISMISS (Doc. #4); GRANTING DEFENDANTS BWXT OF OHIO, INC., PEYTON BAKER, RICH HIGGINS AND ROBERT BERGIN'S MOTION TO DISMISS (Doc. #32); AND OVERRULING PLAINTIFFS' MOTION TO AMEND THE COMPLAINT (Doc. #42)

The causes of action in this Complaint arise from and relate to the employment of certain of the Plaintiffs at the federal Mound Facility in Miamisburg, Ohio. The remaining Plaintiffs are spouses of the employee-Plaintiffs.

The Plaintiffs assert twenty-four Causes of Action against five corporate defendants and four individual defendants. The five corporate defendants are McDermott International, Inc. ("MII"), McDermott Incorporated ("MI"), BWX Technologies, Inc. ("BWXT"), BWXT Federal Services, Inc. and BWXT of Ohio, Inc. ("BWXTO"). The four individual defendants who are allegedly officers and employees of the corporate defendants are Peyton Baker ("Baker"), Rich Higgins ("Higgins"), Robert Bergin ("Bergin") and John Fees.

The Complaint also names "All Other Jane and John Does" as Defendants but none have been identified thus far. In addition, a review of the Docket indicates that Defendants BWXT Federal Services, Inc. and John Fees have not been served a copy of the Complaint or the Amended Complaint.

Approximately one month after the Complaint was filed, it was amended. (Doc. #4.) It is this Amended Complaint that is now before the Court.

Plaintiffs' Amended Complaint sets forth the following twenty-four Causes of Action:

First: Age Discrimination In Violation of O.R.C. §§4112.02 and 4112.99
Second: Racial Discrimination In Violation of O.R.C. §4112.02
Third: Sex/Gender Discrimination In Violation of O.R.C. §4112.02
Fourth: Disability Discrimination In Violation of O.R.C. § §4112.02 and 4112.99
Fifth: Disability Discrimination In Violation of O.R.C. §§4112.02 and 4112.99
Sixth: National Origin Discrimination
Seventh: Common Law Discrimination
Eighth: Unlawful Retaliation, Discipline and/or Discharge in violation of common law and/or public policy and/or O.R.C. Chapter 4112 and §4112.02(I)
Ninth: Breach of Contract/Third Party Beneficiary To Contract
Tenth: Equitable Estoppel
Eleventh: Promissory Estoppel
Twelfth: Negligent Misrepresentation
Thirteenth: Duty and/or Good Faith and Fair Dealings and/or Bad Faith Contract
Fourteenth: Quantum Meruit
Fifteenth: R.I.C.O. Violation (18 U.S.C. §1961; O.R.C. §§2023.31 et seq.,2923.34(C)(4); and 29 U.S.C. §201 et seq.)
Sixteenth: Intentional and/or Negligent Infliction of Emotional Distress
Seventeenth: Failure To Properly Supervise and Administer
Eighteenth: Interference With Protected Rights Pursuant To 29 U.S.C. § 1140

Nineteenth: Fraud and Intentional Misrepresentation
Twentieth: Breach of Fiduciary Duty
Twenty-First: Civil Conspiracy
Twenty-Second: Reckless Conduct, Malice and Punitive Damages in violation of the common law and O.R.C. §2315.21
Twenty-Third: Loss of Consortium
Twenty-Fourth: Class Action

Plaintiffs initiated this action in the United States District Court for the Southern District of Ohio, Western Division at Cincinnati. They invoke the Court's federal question and diversity jurisdiction. The case was subsequently transferred to the Western Division at Dayton because venue in Dayton is proper pursuant to 28 U.S.C. §1391(b)(2) and Southern District of Ohio Local Rule 82.1. (Doc. #58.)

Several motions are now before the Court and ripe for decision. Some of the motions are procedural in nature and the remaining are substantive. The pending procedural motions are Plaintiffs' Motion for Leave To File Memorandum In Excess of Twenty Pages (Doc. #16), Plaintiffs' Motion for Leave To File the Attached Table of Contents (Doc. #22), Plaintiffs' Motion for Extension of Time To File a Response To Defendants' Motion To Dismiss (Doc. #34), Plaintiffs' Motion To Allow the Filing or Acceptance of Plaintiffs' Reply Memorandum (Doc. #49) and Plaintiffs' Motion for Oral Argument (Doc. #50).

The substantive motions that are now ripe for decision are a Motion To Dismiss filed by Defendants MI, MII, and BWXT (Doc. #4) and a Motion To Dismiss filed by Defendants BWXTO, Baker, Higgins and Bergin (Doc. #32). The procedural motions will be addressed first followed by the substantive motions. Plaintiffs' Motion To Amend the

Complaint (Doc. #42) will be addressed after the Motions To Dismiss are addressed.

I. PROCEDURAL MOTIONS

A. Plaintiffs' Motion for Leave To File In Excess of Twenty Pages

On November 24, 2003, Plaintiffs filed their Motion for Leave To File two Memoranda in excess of twenty pages in response to Defendants MII, MI and BWXT's Motion To Dismiss. The two Memoranda total fifty-nine (59) pages and are in response to one twenty-page Motion To Dismiss. One of the two Memoranda was filed eight days earlier and the other the same day as the Motion for Leave To File Excess pages. The reason given for exceeding the twenty-page limit imposed by the Local Rules of Court is "due to the Memorandum containing verbatim portions of the Complaint in countering Defendants' argument."

On November 26, 2003, Defendants MII, MI and BWXT opposed this Motion arguing that Plaintiffs have already filed the above mentioned Memoranda along with another nineteen-page Memorandum in response to the Motion To Dismiss - a total of seventy-eight (78) pages in response to a twenty-page Motion To Dismiss. (Doc. #21.) These Defendants opposed the Motion because Plaintiffs' failure to adhere to the page limit will cause these Defendants significant expense in attempting to reply and because the Court will have to spend additional time and resources to review and analyze Plaintiffs' arguments.

Plaintiffs have already filed three Memoranda In Response to Defendants MII, MI and BWXT's Motion To Dismiss totaling seventy-eight (78) pages without leave of Court and

Defendants MII, MI and BWXT have replied. Actually, Plaintiffs have filed one of those Memoranda In Response three times using three different captions on the CM/ECF docketing system. (Doc. # 17, 18 & 19.)

While Plaintiffs have not shown good cause for exceeding the twenty-page limit, to deny their Motion at this time would only serve to further frustrate an already tortured process. Therefore, Plaintiffs' Motion for Leave To File Memoranda In Excess of Twenty Pages (Doc. #16) is GRANTED *nunc pro tunc*. Their three Memoranda will be considered when MII, MI and BWXT's Motion To Dismiss is analyzed. However, any future disregard for the Local Rules and required approvals by this Court will not be tolerated.

B. Plaintiffs' Motion for Leave To File the Attached Table of Contents

On December 1, 2003, Plaintiffs filed their Motion for Leave To File the Attached Table of Contents. (Doc. #22.) The Table of Contents was for a Memorandum that Plaintiffs had already filed on November 24, 2003. (Doc. #17.) In accordance with the Local Rules, the Table of Contents should have been included with the Memorandum.

This Motion is unopposed. Again, while Plaintiffs have not shown good cause for failing to follow the Local Rules, a denial at this time would only serve to further frustrate the process. Therefore, Plaintiffs' Motion for Leave To File the Table of Contents is GRANTED *nunc pro tunc*. As before, any future disregard for the Local Rules will not be tolerated.

C. Plaintiffs' Motion for Extension of Time To File a Response To Defendants' Motion To Dismiss

In this Motion filed on March 11, 2004, Plaintiffs seek a twenty-day extension of time to April 2, 2004, to respond to Defendants BWXTO, Baker, Higgins and Bergin's Motion To Dismiss. (Doc. #34.) The extension of time is sought due to "caseload and other personal matters."

Plaintiffs aver in this Motion that opposing Counsel was contacted regarding the extension but did not respond. Opposing Counsel does not oppose the extension but submits copies of facsimile transmissions showing that Opposing Counsel did respond by agreeing to a twenty-day extension to March 31, 2004. (Doc. #35.)

Without approval of the Court, Plaintiffs filed their response on April 4, 2004, two days beyond the date requested in their Motion for Extension. In addition, on the following day, Plaintiffs filed a duplicate response using a different caption on the CM/ECF docketing system. (Doc. #37.)

While Plaintiffs' Counsel's statement that opposing Counsel did not respond is, at best, questionable, this is another issue where a denial at this time would only serve to further frustrate the process. Therefore, Plaintiffs' Motion for Extension of Time To File a Response To Defendants' Motion To Dismiss is GRANTED *nunc pro tunc*. As before, any future disregard for the Local Rules and required approvals by this Court will not be tolerated.

D. Plaintiffs' Motion To Allow the Filing or Acceptance of Plaintiffs' Reply Memorandum

On May 19, 2004, Plaintiffs filed their Reply Memorandum to Defendants' Response To Plaintiffs' Motion To File an Amended Complaint. (Doc. #48.) This Reply was due to be filed on May 17, 2004. Along with the Reply Memorandum, Plaintiffs filed their Motion To Allow the Filing or Acceptance of Plaintiffs' Reply Memorandum out of time. (Doc. #49.) Further, Plaintiffs have filed an unsigned Reply Memorandum to the Motion To Allow Filing out of time. (Doc. #55.) They have also filed a second unsigned Reply Memorandum that is a duplicate but is captioned differently on the CM/ECF docketing system from the first Reply Memorandum. (Doc. #56.)

The reason cited by Plaintiffs for filing late was "to provide a thorough and hopefully scholarly analysis of the law." Plaintiffs' Counsel also indicates that he believed that a motion for an extension of time had earlier been filed and that Defendants did not agree with an extension.

Plaintiffs requested and received seven (7) extensions of time to respond to the two Motions To Dismiss. Defendants, therefore, oppose Plaintiffs' Motion on the basis that it is "but one more example of plaintiffs' dilatory practice." (Doc. #52.) Defendants also argue that "plaintiffs' repeated efforts to delay and distract the Court with multiple requests for continuance are at odds with the Court's responsibility to secure the just, speedy and inexpensive determination of every action."

While the Court has good cause to overrule this Motion, it declines to do so. As with the other procedural motions, overruling this motion would only serve to further frustrate

the process. Therefore, Plaintiffs' Motion To Allow the Filing or Acceptance of Plaintiffs' Reply Memorandum is GRANTED *nunc pro tunc*. Plaintiffs' Reply Memorandum will be considered as part of the analysis of Plaintiffs' Motion To Amend the Complaint. As before, any future disregard for the Local Rules and required approvals by this Court will not be tolerated.

E. Plaintiffs' Motion for Oral Argument

Plaintiffs seeks oral argument on "any and/or all" pending motions. (Doc. #50.) The reason given is that the case is complex and judicial economy would be well served. Defendants oppose Plaintiffs' Motion for Oral Argument on the basis that Plaintiffs did not request oral argument when the initial motions were filed and that Plaintiffs have not shown that oral argument is essential to the fair resolution of this case. (Doc. #53.) Plaintiffs filed a unsigned document captioned on the CM/ECF docketing system as a Reply To Response To Oral Hearing but this document is actually duplicate of Document #55 and a second filing of Plaintiffs' unsigned Reply to their Motion To Allow the Filing Or Acceptance of Plaintiffs' Reply Memorandum. (Doc. #56.)

Plaintiffs' Motion for Oral Hearing is offered well beyond the time when it should have been offered and is not well-founded. It is, therefore, OVERRULED.

F. Summary of Procedural Motions

Thus far, Plaintiffs have filed several documents out of time, they have filed at least two documents without proper signature, they have filed several documents in duplicate but with different captions and they have filed several documents without the necessary approval of the Court. All of these

actions are offensive to the dignity and power of this Court and its rules of procedure. Future occurrences will not be tolerated.

That having been said, in the interest of avoiding further delay, the Court has granted all of Plaintiffs' pending procedural motions except for the Motion for Oral Argument. Granting Plaintiffs' pending procedural Motions allows the pending substantive motions to be ripe for adjudication. The analysis next turns to the pending Motions To Dismiss.

II. MOTIONS TO DISMISS

Two groups of Defendants have filed Motions To Dismiss (Doc. #4, 32) and the legal arguments regarding both are similar. Therefore, the two Motions To Dismiss will be considered together.

A. Personal Jurisdiction

Defendants MII, MI, Baker, Higgins and Bergin argue that the claims against them should be dismissed for lack of personal jurisdiction pursuant to Fed.R.Civ.P. 12(b)(2). Plaintiffs oppose the dismissal of MII and MI (Doc. # 15) but have not opposed the dismissal of Baker, Higgins and Bergin due to lack of personal jurisdiction.

1. Legal Standard

When a motion to dismiss for lack of personal jurisdiction pursuant to Fed.R.Civ.P. 12(b)(2) is made, the plaintiff has the burden of proving that jurisdiction exists. *Youn v. Track, Inc.*, 324 F.3d 409, 417 (6th Cir. 2003)(citing *Neogen v. Neo Gen Screening, Inc.*, 282 F.3d 883, 887-88 (6th Cir. 2002)). "Additionally, in the face of a properly supported motion for

dismissal, the plaintiff may not stand on his pleadings but must, by affidavit or otherwise, set forth specific facts showing that the court has jurisdiction." *Theunissen v. Matthews,* 935 F.2d 1454, 1458 (6th Cir. 1991), *appeal after remand,* 992 F.2d 1217 (1993).

A district court ruling on a 12(b)(2) motion to dismiss without conducting an evidentiary hearing, as is the case here, must consider the evidence presented by affidavit or otherwise in a light most favorable to the plaintiff. *Diebold, Inc. v. Firstcard Financial Services, Inc.,* 104 F.Supp.2d 758, 760 (N.D.Ohio 2000)(citing *Dean v. Motel 6 Operating L.P.,* 134 F.3d 1269, 1272 (6th Cir. 1998)). Further, without an evidentiary hearing, a plaintiff can defeat a 12(b)(2) motion to dismiss by making a prima facie showing of jurisdiction. *Id.*

Federal courts apply the law of the forum state when determining whether personal jurisdiction exists in diversity cases. *Youn,* 324 F.3d at 417. If personal jurisdiction exists under the state's long arm statute, the court then must determine whether personal jurisdiction would comport with the Due Process Clause of the U.S. Constitution. *Id.*

For the purpose of a Constitutional Due Process analysis, there is a distinction between general and specific jurisdiction, *Id.* However, either one is an adequate due-process basis for personal jurisdiction, *Id.*

Specific jurisdiction exists when the contacts giving rise to jurisdiction relate to the claim that is before the court. *Id.* at 418. The Sixth Circuit has established a three-part test for determining whether specific jurisdiction violates Due Process requirements. *Id.* For specific personal jurisdiction to exist; (1) a defendant must purposefully avail itself of the privilege of acting in the forum state; (2) the cause of action must arise

from the defendant's activities in the forum state; and (3) the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable. *Id.* (citing *Southern Machine Co. v. Mohasco Industries, Inc.*, 401 F.2d 374, 381 (6th Cir. 1968). Finally, when a state's long arm statute extends to the limits of Due Process, a district court is able to collapse its long arm analysis into its due process analysis. *Matrix Essentials, Inc. v. Harmon Stores, Inc.*, 205 F.Supp.2d 779, 783 (N.D.Ohio 2001) (citing *CMS Generation Co. v. Spectrum Technologies U.S.A., Inc.*, 69 F.Supp.2d 915, 919 (E.D.Mich. 1999)).

General jurisdiction exists when the defendant's contacts with the forum state are "substantial" and "continuous and systematic" even if the claim does not relate to the defendant's contacts with the state. *Youn,* 324 F.3d at 418. General jurisdiction does not exist when the defendant has no contacts, ties or relations in the state. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 448 (1952).

Turning first to the applicable state law, the Ohio Supreme Court has determined that the Ohio long arm statute does not extend to the limits of due process. *Goldstein v. Christiansen,* 638 N.E.2d 541,545 n.1 (1994). Also, the Ohio Supreme Court's interpretation is binding precedent to a federal court sitting in diversity jurisdiction. *O'Brien v. Skinner,* 414 U.S. 524, 531 (1974). Therefore, in a case, such as this, with diversity jurisdiction and Ohio claims, the federal court must determine if personal jurisdiction is present under Ohio's long arm statute and, if so, whether personal jurisdiction comports with the Due Process Clause of the U.S. Constitution.

Ohio's long arm statute allows personal jurisdiction over out-of-state defendants when the cause of action arises out of

their "[t]ransacting any business in this state." *Matrix,* 205 F.Supp. 2d at 785 (citing Ohio's long arm statute, O.R.C. §2307.382(A)(1)). Further, courts determine whether an out-of-state defendant has transacted business in Ohio on a case-by-case basis with only the language of Ohio's long arm statute for guidance. *Id.*

Defendants MII, MI, Baker, Higgins and Bergin have presented Affidavits that challenge whether this Court has personal jurisdiction over them. The burden, therefore, falls to Plaintiffs to show that personal jurisdiction exists.

Plaintiffs argue that MII and MI are subject to personal jurisdiction pursuant to Ohio's long arm statute. Plaintiffs do not, however, present evidence by valid affidavit or otherwise that personal jurisdiction over MII, MI, Baker, Higgins or Bergin exists. In fact, Plaintiffs present no argument at all that this Court has personal jurisdiction over Baker, Higgins or Bergin.

When personal jurisdiction is challenged, Plaintiffs may not stand on their pleadings and have, therefore, not met their burden of proof. This is enough to find that this Court does not have personal jurisdiction over MII, MI, Baker, Higgins or Bergin and to grant MII, MI, Baker, Higgins and Bergin's Motions To Dismiss with prejudice. However, there is more.

Plaintiffs also do not present any arguments that personal jurisdiction over MII, MI, Baker, Higgins or Bergin in Ohio comports with due process. This is enough to find that this Court does not have personal jurisdiction over MII, MI, Baker, Higgins or Bergin and to grant MII, MI, Baker, Higgins and Bergin's Motions To Dismiss with prejudice. However, there is yet more.

If Plaintiffs' Amended Complaint was verified, which it is not, and if the two Jackson Affidavits attached to Plaintiffs' Memorandum In Response To Defendants MII, MI and BWXT's Motion To Dismiss were signed, dated and notarized, which they are not, Plaintiffs still cannot make a prima facie case that MII and MI should be subject to Ohio's long arm statute. Again, this is enough to find that this Court does not have personal jurisdiction over MII and MI and to grant MII and MI's Motion To Dismiss with prejudice for lack of personal jurisdiction.

Regarding presenting a prima facie case, Plaintiffs cite six provisions of Ohio's long arm statute that they believe confer personal jurisdiction upon MII and MI. They are:

> (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:
> (1) Transacting any business in this state;
> (2) Contracting to supply services or goods in this state;
> (3) Causing tortious injury by an act or omission in this state;
> (4) Causing a tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
> ***
> (6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;

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(9) Contracting to insure any person, property, or risk located within this state at the time of contracting.

In a determination of personal jurisdiction regarding MII and MI, the Court would determine if MII and MI have acted directly or by an agent as to one of the causes of action listed above. The analysis would first set forth the contacts, or lack thereof, that MII and MI are alleged to have with regard to the Causes of Action in Plaintiffs' Amended Complaint and would then determine if those contacts were made with regard to one of the relevant causes of action from Ohio's long arm statute. While not necessary, the Court will hereinafter engage in this analysis.

2. Contacts With Ohio

Plaintiffs' Amended Complaint alleges that McDermott[1] exercises dominion and control over a group of subsidiary corporations and that this control was especially prominent in the areas of corporate policy and employee relations, personnel policies and practices, inter- and intra-management relations, company benefits, thrift plan, health insurance, disability and disability insurance, long term disability and long term disability insurance, accidental death or dismemberment insurance, pension and other matters. (Am. Compl. ¶¶22-23.) However, this claim that McDermott exercises dominion and control is merely a conclusory statement and not entitled to consideration unless supported by

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[1] The Amended Complaint indicates that both MII and MI are collectively referred to as McDermott. (Am. Compl. ¶6.) The Amended Complaint also alleges that BWXT is a subsidiary of MII and MI.

factual allegations. *Thompson v. Executive Transport Service,* 2004 WL 291188 at *3 (Ohio Ct. App. Feb. 13, 2004).

Plaintiffs next cite two factual allegations in their Amended Complaint where officers and/or agents of MII and/or MI controlled events from afar by directing persons to come to the Mound Facility. (Am. Compl. ¶¶253-60, 1018.) One of the allegations involving MII and/or MI is a claim that Roger Tetrault, Chairman of both MII and MI was informed of Mr. Christopher's report of time card violations and the subsequent treatment of Mr. Christopher. (Am. Compl. ¶258.) Plaintiffs state in their Response that "it is alleged that the former Chairman of both McDermott Inc. and McDermott International and/or his agents was informed of the conduct by Mr. Christopher and sent (directly or through his subordinates) persons into Ohio to take charge of the situation ..." However, none of the paragraphs referred to in the Amended Complaint set forth allegations that anyone sent agents into Ohio to take charge of the situation.[2] The other allegation is a claim that, in the fall of 2000, an investigation into the relationship between Mr. Baker and Mrs. Hood was conducted by officials "from BWXT and/or McDermott Corporate Headquarters in New Orleans." (Am. Compl. ¶1018.)

Next, Plaintiffs argue that MII and MI controlled the resolution of health care issues. In support of this allegation, they cite several paragraphs in the Amended Complaint that do not mention MII or MI. (Am. Compl. ¶¶15, 23, 47-48, 58, 68-70, 73, 74, 88, 174, 298, 685-88, 690.) They also cite allegations that one of the Plaintiffs accepted COBRA benefits

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[2] This allegation is, however, set forth in one of Jackson's unsigned Affidavits.

from a carrier who indicated that it was the new COBRA insurance carrier for McDermott (Am. Compl. ¶684) and allegations that this individual spoke twice to an individual at McDermott regarding COBRA issues (Am. Compl. ¶¶689, 691).

Plaintiffs next refer to pages 37 to 41 and 77 to 81 in their Amended Complaint for allegations of specific contacts with McDermott. However, the Amended Complaint does not mention MII or MI on pages 37 through 41. Also there is no mention of MII or MI on pages 77 through 81 except for the alleged contacts already mentioned at paragraphs 684, 689 and 691 above.

Plaintiffs next state in their Memorandum In Response that phone calls were made from and to Ohio and the issues over which Defendants had control arose in Ohio. They further state that MII and MI controlled, administered and selected the insurance and were responsible for both its adequacy and its improper administration. However, again, Plaintiffs do not identify where in the Amended Complaint these allegations are made and, therefore, offer no facts to support this conclusory statement.

The next contact alleged by Plaintiffs in their Memorandum In Response is their allegation that MII and MI secunded employees into the Mound Facility. A secunded employee, according to Plaintiffs, is an employee for which "BWXT/McDermott" was responsible for a part of their salary and who was not a member of the existing workforce when BWXT/McDermott took responsibility for the Mound Facility. (Am. Compl. ¶¶72-75.) However, while there are allegations of harm done as a result of secunded employees (Am. Compl. ¶¶75, 125-27, 143, 171), there are no

allegations in the Amended Complaint that these were employees sent by MII or MI.

The analysis of alleged contacts in Ohio next turns to the two unsigned and undated Affidavits of James E. Jackson ("Jackson"). The Affidavits are attached to Plaintiffs' Memorandum In Response to MII and MI's Motion To Dismiss. (Doc. #15.) Jackson's unsigned and undated Affidavit attached as Exhibit 1 ("Jackson Aff. Ex 1") will first be considered followed by Jackson's unsigned and undated Affidavit attached presumably as Exhibit 2 ("Jackson Aff. Ex. 2").

Regarding MII and MI, Jackson first alleges that, in November of 1997, MII sent a representative of MII and a representative of United Health Care of La. to meet with four individuals. (Jackson Aff. Ex. 1 ¶7.) He then alleges that he later got permission from McDermott to put a new insurance policy into force. (*Id.* ¶8.) Jackson does not say where these contacts took place nor does he say where he was located and by whom he was employed. However, even though the Affidavit was allegedly taken in the State of Rhode Island, the analysis will proceed based upon the assumption that Jackson was employed by BWXT or BWXTO and was located at the Mound Facility in Ohio.

Jackson next alleges that, upon information and belief, Rod Woolsey was Senior Vice President for HR and Compliance for MI from 1999 to 2000 after he was Senior Vice President for BWX for special assignments. (Jackson Aff. Ex. 1 ¶ 10.) However, this allegation cannot be considered because it is based upon information and belief and not upon personal knowledge.

Jackson next alleges that, during a meeting in New Orleans, La. at MI headquarters, Lou Sannio, VP HR for MII and MI informed Jackson that Jackson worked for Sannio and ultimately for Mr. Woolsey. However, this alleged statement did not take place in Ohio, is hearsay and is not a basis for any of the claims in Plaintiffs' Amended Complaint.

Jackson next alleges that individuals from McDermott subsidiary corporations not directly associated with BWXTO conducted an investigation regarding Mr. Christopher. (Jackson Aff. Ex. 2 ¶7.) This is not a new contact but the same contact referred to earlier regarding Mr. Christopher. (Am. Compl. ¶258.)

Jackson next alleges that Tetrault was two (2) steps above Fees, however, as a practical matter, Fees could go directly to Tetrault on sensitive matters. (Jackson Aff. Ex. 2 ¶ 15.) This, however, is merely a conclusory statement and not entitled to consideration unless supported by factual allegations.

Jackson next alleges that it was not unusual for high officials from MII and/or MI to get involved and/or take control over the direction of sensitive matters at the Mound Facility. (Jackson Aff. Ex. 2 ¶16.) This, again, is a conclusory statement and not entitled to consideration unless supported by factual allegations.

Jackson next refers to another example where officials from MII and MI came to the Mound Facility to take over an investigation. However, for the source of this allegation, Jackson refers to paragraphs in another complaint filed in another lawsuit and not to his personal knowledge. This statement, therefore, cannot be considered.

Jackson next alleges that MII and MI had an oversight group for investigation of reports of wrongful conduct by persons employed at subsidiary corporations including BWXTO's activities at the Mound Facility. (Jackson Aff. Ex. 2 ¶18.) This, again, is a conclusory statement not supported by specific factual allegations. Where specific factual allegations of investigations by MII and/or MI employees are presented, they are considered elsewhere herein.

Finally, Jackson alleges that corporate offices of MII and MI in New Orleans had to approve any check issued by BWXTO at the Mound Facility. (Jackson Aff. Ex. 2 ¶20.) Jackson also alleges that MII and MI maintained control over how employee time was to be captured. (*Id.*)

In sum, Plaintiffs have alleged the following contacts regarding MII and MI: officials from MII and/or MI investigated Mr. Christopher's report of time card violations and investigated the relationship between Mr. Baker and Mrs. Hood; one of the Plaintiffs accepted COBRA benefits from a carrier who indicated that it was the new COBRA insurance carrier for MII and/or MI and this individual spoke twice to an individual at MII and/or MI regarding COBRA issues; employees from other MII and/or MI subsidiaries transferred into the Mound Facility and part of their salary was paid by BWXT; MI sent a representative of MI and a representative of United Health Care to meet with four individuals, presumably at the Mound Facility, regarding insurance; MI approved a new insurance policy; and MII corporate offices approved any checks issued by BWXTO and maintained control over how employee time was captured.

The itemization of the contacts, or lack thereof, next turns to evidence presented by MII and MI. While Plaintiffs criticize and question the evidence presented by MII and MI,

it will be considered to the extent that it is not conflicted by evidence presented by the Plaintiffs keeping in mind that the evidence presented is viewed in a light most favorable to Plaintiffs. *See, Welsh v. Gibbs,* 631 F.2d 436, 439 (6th Cir. 1980), *cert. denied,* 450 U.S. 981 (1981).

MII and MI submitted the Affidavits of Robert E. Stumpf ("Stumpf"), an Assistant Secretary of MII, along with their Motion To Dismiss. Stumps' first Affidavit is dated 8/5/03.

In this first Affidavit, Stumpf testifies that neither MII or MI is qualified to transact business in Ohio; neither has any offices, addresses or telephone listings in Ohio; neither has bank accounts in Ohio; neither was an employer of any Plaintiff and neither was involved in the hiring or termination decisions regarding any Plaintiff. (Stumpf 8/5/03 Aff. ¶¶5, 8, 14, 15, 16, 17.) Stumpf also testifies that MI has one part-time employee in Ohio beginning in January 2003 who works out of his home and MII has no employees in Ohio. (*Id.* ¶¶12-13.) In addition, Stumpf testifies that MII neither owns nor leases any property, plant or equipment in Ohio and MI presently owns some furniture and fixtures and leases some computer equipment and copying machines in Ohio but does not conduct business operations in Ohio. (*Id.* ¶¶6-7.) Finally, Stumpf testifies that MII derives no income from sources in Ohio and MI generates no income in Ohio but does derive some income from tax apportionment factors. (*Id.* ¶¶9-10.) In a second Affidavit dated 1/9/04, Stumpf indicates that BWXTO, BWXFS, BWXS, BWXT, BWICO, MI and MII are separate and distinct legal entities that each have their own board of directors and officers and each follow their own corporate governance procedures. (Stumpf 1/9/04 Aff. ¶¶7-8.)

Having set forth the evidence regarding contacts and/or the lack thereof, the analysis would turn to whether any of these contacts regard a cause of action that results in coverage by Ohio's long arm statute. In performing this analysis, each section of the Ohio long arm statute identified as a possibility by the Plaintiffs would be addressed beginning with whether any of Plaintiffs' causes of action were a result of MII or MI transacting any business in Ohio.

3. Transacting Business In Ohio

Transacting business has been broadly defined by the Ohio Supreme Court as: "to prosecute negotiations; to carry on business; to have dealings." *Kentucky Oaks Mall Co. v. Mitchells' Formal Wear, Inc.*, 559 N.E.2d 477, 480 (Ohio Ct. App. 1990). An Ohio Appeals Court found that there must be a showing that the defendant regularly does or solicits business, that the defendant engages in any other persistent course of conduct, or that the defendant derives substantial revenue from goods used or consumed or services rendered in Ohio. *Jackson, Exr. v. State Street Bank and Trust Co.*, 674 N.E.2d 706, 710 (Ohio Ct. App. 1996), *appeal not allowed*, 669 N.E.2d 856 (Ohio 1996).

This first application of Ohio's long arm statute to this case raises the question of MII and MI's business relationship to the other defendants, specifically those who may have regularly transacted business in Ohio. The business relationship is a minimum contact the weight of which is determined by the degree of control or identity. *In re Teletronics Pacing Systems, Inc.*, 953 F.Supp. 909, 915 (S.D.Ohio 1997). Further, a company does not purposefully conduct business in a state merely by owning all or some of a corporation subject to jurisdiction. *Dean*, 134 F.3d at 1274. Finally, the corporate law question of "veil piercing" is not

applicable to a determination of whether a party whose related business entity has been transacting business in Ohio is itself transacting business in Ohio. *Id.* (quoting *Energy Reserves Group, Inc. v. Superior Oil Co.*, 460 F.Supp. 483, 506 (D.Kan. 1978)).

In this case, Plaintiffs have made a conclusory allegation that MII and MI exercise dominion and control over defendants BWXT and BWXTO. Plaintiffs have also alleged that BWXT and BWXTO transacted business in Ohio. However, Plaintiffs have provided few factual allegations to support the conclusion that MII and MI exercise dominion and control over BWXT and BWXTO.

Plaintiffs have presented allegations that MII and/or MI conducted investigations of two matters at the Mound Facility, that MI approved an insurance policy, and that MII corporate offices approved checks issued by BWXTO and maintained control over how employee time was reported. MII and MI may have some sort of business relationship with BWXT and BWXTO but Plaintiffs have not shown that either MII or MI have any regular contacts in Ohio such as offices, employees, bank accounts and property ownership nor have they shown that either MII or MI earn income in Ohio.

Here, as described in *Tectronics,* the business relationship is a minimum contact the weight of which is determined by the degree of control or identity and the degree of control or identity shown by Plaintiffs is minimal. Plaintiffs' "dominion and control" is, therefore, considered as but a minimum contact in Ohio. In addition, the arguable evidence regarding the business relationship is also considered separately as arguable direct contacts.

Plaintiffs have not alleged that MII or MI had any direct contacts in Ohio beyond sending someone to conduct two investigations, receiving calls regarding issues with a COBRA insurance policy, sending an individual to Ohio to discuss health care insurance, approving a new insurance policy and approving checks. In addition, while there is an allegation that employees from other MII and/or MI subsidiaries transferred to the Mound Facility, there is no evidence that those contacts were initiated by MII or MI.

In view of these few contacts, including a minimum contact due to "dominion and control," there is uncontroverted evidence that neither MII or MI are qualified to transact business in Ohio, neither have an Ohio address, telephone listing or bank account; and neither were involved in hiring or termination decisions regarding any of the Plaintiffs. Further, there is uncontroverted evidence that: MII has no employees in Ohio and MI has had one part-time employee since January of 2003; MII has no property in Ohio and MI owns and/or leases some office equipment but does not conduct business in Ohio; MII derives no income from Ohio sources; and MI derives some income from tax apportionment factors. Finally, there is uncontroverted evidence that BWXT, BWXTO, MII and MI are separate legal entities. Therefore, the contacts identified by Plaintiffs, including credit for proof of a minimal business relationship, do not rise to the level of transacting business anticipated by Ohio's long arm statute.

4. Contracting To Supply Services or Goods In Ohio

Having determined that neither MII or MI transacted business in Ohio in accordance with Ohio's long arm statute, the analysis would turn to whether Plaintiffs have identified a cause of action that results from MII or MI supplying

services or goods in Ohio. There are no factual allegations that MII or MI contracted to supply services or goods in Ohio and, as determined hereinbefore, the arguable factual allegations regarding a business relationship reveal minimal contact that is not sufficient to support a finding that MII or MI was acting through BWXT or BWXTO to supply services or goods in Ohio.

5. Caused Tortious Injury By an Act In Ohio

The analysis next turns to whether MII or MI acted to cause a tortious injury in Ohio by an act or omission in Ohio. There are no factual allegations that either MII or MI caused a tortious injury in Ohio and, as determined hereinbefore, the arguable factual allegations regarding a business relationship reveal minimal contact that is not sufficient to support a finding that either MII or MI was acting through BWXT or BWXTO to cause a tortious injury by an act in Ohio.

6. Caused Tortious Injury By Act Outside Ohio If Sufficient Contacts In Ohio

The analysis would next turn to whether MII or MI acted as to a cause a tortious injury in Ohio by an act or omission outside of Ohio if MII or MI regularly does or solicits business in Ohio. There are no factual allegations that MII or MI regularly does or solicits business in Ohio or that MII or MI caused a tortious injury in Ohio. Further, the arguable factual allegations regarding a business relationship reveal minimal contact that is not sufficient to show that MII or MI was acting through BWXT or BWXTO to cause a tortious injury in Ohio.

7. Knowingly Caused Tortious Injury By Act Outside of Ohio

The analysis would next turn to whether MII or MI caused a tortious injury in Ohio to any person by an act outside Ohio committed with the purpose of injuring persons when they might reasonably have expected that some person would be injured thereby in Ohio. Again, there are no factual allegations that either MII or MI caused a tortious injury in Ohio. Further, as determined hereinbefore, the arguable factual allegations regarding a business relationship reveal minimal contact that is not sufficient to support a finding that MII or MI acted through BWXT or BWXTO to cause a tortious injury in Ohio.

8. Contract To Insure

The analysis would finally turn to whether MII or MI acted as to a cause of action arising from MII or MI contracting to insure any person, property or risk located within Ohio at the time of contracting. When viewed in a light most favorable to Plaintiffs, there is evidence, based upon the hearsay statement of a COBRA insurance carrier and based upon arguable testimony by Jackson that McDermott provided insurance, through insurance carriers, to Plaintiffs in Ohio. However, obtaining insurance coverage from a third-party carrier is not "contracting to insure" within the meaning of Ohio's long arm statute. *Escada International, Inc. v. Eurocargo Express,* 2002 WL 1821946 at *5 (Ohio App. Ct. Aug. 8, 2002), *appeal not allowed,* 781 N.E.2d 1019 (Ohio 2003). Therefore, there are no factual allegations that MII or MI contracted to insure any person, property or risk in Ohio. Also, as determined hereinbefore, the arguable factual allegations regarding a business relationship reveal minimal contact that is not sufficient, particularly in light of the

Escada holding, to support a finding that MII or MI acted through BWXT or BWXTO to insure any person, property or risk in Ohio.

In sum, all of the sections of Ohio's long arm statute cited by Plaintiffs would have been reviewed and Plaintiffs would not have sustained their burden of showing that either MII or MI is subject to personal jurisdiction pursuant to Ohio's long arm statute. The second step in the two step analysis is to determine if personal jurisdiction over MII and/or MI comports with the Due Process Clause of the U.S. Constitution.

The Court would not need to reach this analysis because Ohio's long arm statute would not have been satisfied and because Plaintiffs have presented no due process arguments. However, should the court have reached this second step, it would have found that personal jurisdiction over MII and/or MI does not comport with their due process rights.

General jurisdiction does not exist because MII and/or MI's contacts with Ohio are not substantial and are not continuous and systematic based upon the evidence presented and discussed hereinbefore. Specific jurisdiction does not exist because the specific acts of MII or MI or consequences caused by the acts of MII or MI do not have a substantial enough connection with Ohio to make the exercise of jurisdiction over MII or MI reasonable. The determination that neither general nor specific jurisdiction exists would also be based upon the finding hereinbefore that the arguable factual allegations regarding a business relationship reveal minimal contact that is not sufficient to support a finding that MII or MI acted through BWXT or BWXTO.

9. Personal Jurisdiction Over Baker, Higgins and Bergin

Baker, Higgins and Bergin argue that they do not have the necessary jurisdictional contacts with Ohio to satisfy Ohio's long arm statute or applicable due process requirements. They present Affidavits indicating that they are not now Ohio residents, they were not Ohio residents when the complaint was filed, they conduct no personal business in Ohio, they own no real property in Ohio and they do not have an office, mailing address or telephone listing in Ohio. (Baker Aff. ¶3; Bergin Aff. ¶2; Higgins Aff. ¶4.)

In response to these Affidavits, Plaintiffs do not present evidence by valid affidavit or otherwise that personal jurisdiction over Baker, Higgins or Bergin exists. When personal jurisdiction is challenged, Plaintiffs may not stand on their pleadings and have, therefore, not met their burden of proof. This is enough to find that this Court does not have personal jurisdiction over Baker, Higgins or Bergin and to grant Baker, Higgins and Bergin's Motion To Dismiss with prejudice.

10. Conclusion

Defendants MII, MI, Baker, Higgins and Bergin have presented evidence in the form of Affidavits that indicates that this Court does not have personal jurisdiction over them. Plaintiffs have presented no evidence by valid affidavit or otherwise that personal jurisdiction exists. In addition, Plaintiffs have not submitted evidence or argument that exercising personal jurisdiction over MII, MI, Baker, Higgins or Bergin in Ohio would comport with due process requirements. Therefore, Plaintiffs have not met their burden of proof and MII, MI, Baker, Higgins and Bergin's Motions To Dismiss for lack of personal jurisdiction are GRANTED.

Plaintiffs- Amended Complaint against MII, MI, Baker, Higgins and Bergin is DISMISSED WITH PREJUDICE.

Should the Court have considered Plaintiff's unverified Amended Complaint and unsigned and undated affidavits, the Court would have concluded that, when viewed in a light most favorable to Plaintiffs, the Court may not exercise personal jurisdiction over MII and MI pursuant to Ohio's long arm statute and in accordance with due process requirements. MII and MI's Motion To Dismiss for lack of personal jurisdiction would have been dismissed on this basis. The analysis next turns to the second branch of the Motions To Dismiss.

B. Insufficiency of Service of Process

BWXTO, Baker, Higgins and Bergin seek to have all claims against them dismissed pursuant to Fed.R.Civ.P. 12(b)(5) because attempts to serve them were deficient in several ways. Plaintiffs respond that service was not deficient and, should the Court find that it was, they should be given a reasonable period of time to perfect service. All claims against Baker, Higgins and Bergin have been dismissed hereinbefore with prejudice so process with regard to them need not be addressed.

BWXTO presents evidence that the Amended Complaint and the Jury Demand that they received was not signed (Florence J. Phillips Aff. ¶2), they received no summons (*id.*) and the attempted service was untimely (Doc. # 1, 3, 25-27). Turning first to signatures, Fed.R.Civ.P. requires that all pleadings must be signed and authorizes the court to strike an unsigned pleading.

Plaintiffs respond that Defendants have cited no law supporting their claim that the Amended Complaint served upon the Defendants must be signed. However, Rule 11 requires that the Amended Complaint be signed and Plaintiffs have cited no law indicating that the copy of a complaint served upon a defendants does not require signature. Therefore, BWXTO has not received a signed copy of the Amended Complaint as required by Rule 11.

Turning next to summons, Fed.R.Civ.P. 4(c)(1) requires the service of a summons, along with a complaint, upon the defendants. A summons was not served upon BWXTO and Plaintiffs response is that "counsel is stunned." Plaintiffs further respond that Counsel personally checked each package that was to have included the summons prior to sealing and that all other Defendants acknowledge receipt of their summons. Other than being stunned, Plaintiffs have offered no evidence to rebut BWXTO's sworn testimony that they did not receive a summons. Therefore, BWXTO has not received a summons as required by Rule 4(c)(1).

Turning finally to service, to be effective, it must be completed within 120 days after the complaint is filed. Fed.R.Civ.P. 4(m). Further, if the plaintiff shows good cause for the failure, the court may extend the time for service for an "appropriate" period. Fed.R.Civ.P. 4(m).

Plaintiffs' original Complaint was filed on May 22, 2003. (Doc. #1.) Plaintiffs Amended Complaint was then filed on June 26, 2003. (Doc. #3.) In spite of an alert from Defendants less than five weeks after the Amended Complaint was filed that service had not been perfected (Doc. #4, fn. 1, 2), Plaintiffs did not attempt to perfect service until they requested the Clerk to issue a summons and the Amended Complaint on December 31, 2003. Further, Plaintiffs did not

request nor obtain leave of Court to extend the time period during which service must be completed. Therefore, neither Plaintiffs' Complaint nor Plaintiffs' Amended Complaint were served within the required 180 days following filing of the Complaints.

The Amended Complaint and Jury Demand served on BWXTO was not signed as required by Fed.R.Civ.P. 11 and it was not served within the required time period. Also, Plaintiffs did not serve a summons on BWXTO as required by Fed.R.Civ.P. 4(c)(1). Therefore, BWXTO's Motion To Dismiss for insufficiency of service of process is GRANTED. Plaintiffs' Amended Complaint against BWXTO is DISMISSED. In addition, the Amended Complaint is dismissed hereinafter for another reason.

C. Failure To Comply With Pleading Requirements

MII, MI, BWXT, BWXTO, Baker, Higgins and Bergin move to have all claims against them dismissed for failure to comply with the pleading requirements of Fed.R.Civ.P. 8(a)(2) and 8(e)(1). The claims against MII, MI, Baker, Higgins and Bergin have been dismissed with prejudice and the claim against BWXTO has been dismissed hereinbefore. Remaining is BWXT's Motion To Dismiss for failure to comply with pleading requirements. The Plaintiffs oppose this Motion.

Fed.R.Civ.P. 8(a)(2) requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief," and Rule 8(e)(1) requires that "[e]ach averment of a pleading ... be simple, concise and direct." The purpose of these requirements is to give the defendant fair notice of the plaintiff, the claim and the grounds for the claim. *Conley v. Gibson,* 355 U.S. 41, 47 (1957). Further, a

complaint is to be construed as to do substantial justice. Fed.R.Civ.P. 8(f). Finally, a trial court has the discretion to strike or dismiss a complaint that violates these rules of pleading. *Moss v. Columbus Board of Education,* 2001 WL 1681117 at *13-14 (S.D.Ohio Sept. 27, 2001).

"[T]he appropriate length and complexity of a complaint will vary with each case. *Morgan v. Kobrin Securities, Inc.,* 649 F.Supp. 1023, 1026 (N.D.Ill. 1986). Complaints that appear to be prolix and muddled have been dismissed when the court was unable to determine what the claims were and the complaint was neither short nor plain. *Collier v. First Michigan Cooperative Housing Association,* 274 F.2d 467, (6th Cir. 1960). In addition, complaints that are confusing, disjointed and repetitive have been dismissed when the court is unable to determine the necessary elements and the factual allegations upon which the claims are based. *Dudley Enterprises, Inc. v. Palmer Corporation,* 822 F.Supp.496, 500 (N.D.Ill. 1993). However, complaints that are lengthy and yet succinct and easily understandable and involve several parties and several claims may satisfy Rule 8 requirements. *Morgan,* 649 F.Supp. at 1027; *Honorable v. The Easy Life Real Estate System, Inc.,* 182 F.R.D. 553, 562 (N.D.Ill. 1998).

Plaintiffs are entitled to bring forward a lengthy complaint, particularly where it involves multiple plaintiffs, multiple defendants and multiple causes of action. Also, each defendant is entitled to be able to ascertain which causes of action are being pled against him or her by which defendant based upon which set of factual allegations.

In this case, Plaintiffs' Amended Complaint is 132 pages long, contains 1157 paragraphs and alleges twenty-four (24) causes of action. Forty-eight (48) named Plaintiffs and nine

(9) named Defendants are identified in the Amended Complaint.

BWXT seeks to have the Amended Complaint dismissed because it is "unreasonably confusing and improper." Specifically, BWXT argues that the Amended Complaint "rarely" distinguishes between various defendants' conduct and does not specify which defendants took which actions against which plaintiffs. In addition, BWXT argues that Plaintiffs' Causes of Action are devoid of any facts or references to specific facts set forth elsewhere in their Amended Complaint.

In this case, Plaintiffs' Amended Complaint is lengthy but it involves multiple Defendants, multiple Plaintiffs and multiple Causes of Action. However, the specific Plaintiffs that re bringing certain claims cannot be determined.

Paragraph 2 of the Amended Complaint identifies a list of names, both first and last names, that are presumably referred to in the remainder of the Complaint as "Plaintiffs." Paragraph 3 identifies another list of names, both first and last, that are presumably referred to in the remainder of the Complaint as "Spousal Plaintiffs."

However, rather than identifying the parties bringing the cause of action as the "Plaintiffs" or the "Spousal Plaintiffs", specific names are identified as bringing certain of the causes of action. Yet, only the last name is provided and two individuals with the same last name are listed as Plaintiffs in the Caption of the Amended Complaint. This is further complicated by Plaintiffs' statements in their Memorandum In Opposition To BWXT's Motion To Dismiss that, "These several spousal Plaintiffs bring more than the loss of consortium claims" and "the discharged Plaintiffs have

individual claims and are separate and distinct from each other and are separately alleged." As a result, which specific Plaintiff or Plaintiffs are bringing the Second, Third, Fourth, Twelfth, Fourteenth, and Eighteenth Causes of Action cannot be determined.

The remaining causes of action, with the exception of the Fifth and Sixth, are presumably brought by the "Plaintiffs" as they are identified in paragraph 2 of the Amended Complaint. The Sixth Cause of Action is brought by one of the Plaintiffs specifically identified by name. The Fifth Cause of Action does not set forth specific names but is brought by all Plaintiffs who have exposure to radiation or hazardous chemicals. Presumably, any Plaintiff who is identified in the Amended Complaint as being exposed to radiation or hazardous chemicals is bringing this Cause of Action and those not specifically identified as having been exposed are not bringing this Cause of Action.

As to the identification of Defendants, each Cause of Action specifies that it is being brought against all Defendants or all Defendants with the exception of those specifically named. This is enough for the each of the Defendants to identify which claims are being brought against them.

As to the grounds for each claim, under each Cause of Action the Amended Complaint realleges each allegation previously set forth. The question then becomes whether a specific Defendant is able to read a specific Cause of Action and then refer to the remainder of the Complaint and determine the factual allegation(s) supporting that Cause of Action. Defendants have offered no specific examples where they are unable to determine the factual allegations supporting a Cause of Action and the Court is not compelled to look for specific examples. Therefore, the Amended Complaint

arguably sets forth whatever grounds are available for each claim.

In sum, the Court is unable to identify which of the named Plaintiffs is bringing several of the Causes of Action. Also, striking only these Causes of Action would presumably lead to attempts to modify an already lengthy and complicated document and result in further confusion. Therefore, the entire Amended Complaint against BWXT is dismissed.

Plaintiffs are given until not later than thirty (30) days following entry of this Order to submit an amended complaint that satisfies the requirements of Rule 8. The Defendants must be able to identify the cause of action, specifically which Plaintiffs are bringing it, specifically which Defendants it is against and specifically the grounds upon which it is based.

There are several branches of the Motions To Dismiss that have not been analyzed. However, since all of the Defendants that have been served and some that have not been properly served have been dismissed, there is no need to go any further with the analysis at this time with one exception. That exception is to note that there is no cause of action for punitive damages and that there is no cause of action for "class action." To this exception, all Parties agree.

III. SUMMARY

In the interest of avoiding delay and to avoid the further frustration of an already tortured process, Plaintiffs' procedural motions (Doc. # 16, 22, 34, 49) are GRANTED with the exception of Plaintiffs' Motion for Oral Argument (Doc. #50). Plaintiffs' Motion for Oral Argument is not well founded and is OVERRULED. In addition, any future

disregard for the Local Rules and required approvals by this Court will not be tolerated.

Defendants MII, MI, Baker, Higgins and Bergin have presented evidence that this Court does not have personal jurisdiction over them and Plaintiffs, upon whom the burden is placed, have presented no evidence to the contrary. In addition, Plaintiffs have presented no evidence or argument that exercising personal jurisdiction over MII, MI, Baker, Higgins or Bergin would comport with due process requirements. Therefore, MII, MI, Baker, Higgins and Bergin's Motions To Dismiss (Doc. #4, 32) for lack of personal jurisdiction are GRANTED. Plaintiffs' Amended Complaint against MII, MI, Baker, Higgins and Bergin is DISMISSED WITH PREJUDICE.

The Amended Complaint and Jury Demand served on BWXTO was not signed as required by Fed.R.Civ.P. 11 and it was not served within the required time period. Also, Plaintiffs did not serve a summons on BWXTO as required by Fed.R.Civ.P. 4(c)(1). Therefore, BWXTO's Motion To Dismiss for insufficiency of service of process is GRANTED. Plaintiffs' Amended Complaint against BWXTO is DISMISSED. At this point, only the Amended Complaint against BWXT remains.

Regarding the Amended Complaint, the Court is unable to identify which of the named Plaintiffs is bringing several of the Causes of Action and striking only these Causes of Action would presumably lead to attempts to modify an already lengthy and complicated document and to further confusion. Therefore, the entire Amended Complaint against Defendant BWXT is DISMISSED.

Plaintiffs are given until not later than thirty (30) days following entry of this Order to submit an amended complaint that satisfies the requirements of Rule 8. If an amended complaint is submitted, the Defendants must be able to identify the cause of action, specifically which Plaintiffs are bringing the cause of action, specifically which Defendants the cause of action is against and specifically the grounds upon which the cause of action is based. Also, Plaintiffs have recognized that there is no cause of action for "punitive damages" and there is no cause of action for "class action" so they should not be included as causes of action in an amended complaint. Finally, an amended complaint, if filed, must be properly served upon the desired Defendants keeping in mind that Defendants MII, MI, Baker, Higgins and Bergin have been dismissed with prejudice.

The dismissal of the Amended Complaint renders Plaintiffs' Motion To Amend that Amended Complaint (Doc. #42) moot. Therefore, Plaintiffs' Motion To Amend is OVERRULED as being moot.

DONE and **ORDERED** in Dayton, Ohio, this Fourth day of October, 2004.

s/Thomas M. Rose
THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

Case No. 3-:04-CV-305

[Filed June 26, 2003]

GEORGE NAFZIGER, et al.,
Plaintiffs,

-vs-

MCDERMOTT INTERNATIONAL, INC., et al.,
Defendants.

Excerpts of the Complaint and Jury Demand
[pages 118-132]

[p. 118]

1016. Meanwhile, Mr. John Krueger was designated to be Project Manager after the ISP was concluded. Mr. Krueger told Ms. Fitzpatrick that he expected her to continue as his Executive Secretary.

1017. On June 2, 2001, Ms. Fitzpatrick was terminated from her position allegedly as part of the ISP.

1018. At the time of Ms. Fitzpatrick's termination of employment, she had achieved, at least sixty-one (61) points towards full retirement of "Combo 80 Retirement Standard" at the Mound Facility. Because of her position as Executive Secretary, she would have remained working at the Mound Facility until it closed or she was eligible to retire under either "Combo 80" or the Industry Standard of "Combo 70".

1019. Ms. Fitzpatrick's work and/or substantially similar work continued to be performed, after her termination; first by a woman who did not have sufficient time at the Mound Facility to have vested pension rights and who was subsequently terminated prior to having vested pension rights and was replaced by a younger employee. Both these persons had less experience and/or fewer qualifications than Ms. Fitzpatrick.

1020. With termination of employment, Ms. Fitzpatrick lost retirement health insurance. Ms. Fitzpatrick would have continued to work until she reached fifty-five (55) years of age or the site closed; and as a consequence, she lost between $100,000.00 and $750,000.00 in future wages.

1021. Ms. Fitzpatrick also lost approximately two (2) weeks of pro-rated vacation leave with the value of approximately $1,538.46. She also did not receive her annual raise in May 2001, which would have enhanced both her unemployment compensation and retirement pay. The exact values of all of the foregoing be determined through discovery.

1022. As previously stated in this Complaint, subsequent to the ISP, Defendants started hiring "Demo Techs" but they purposefully avoided hiring females, especially cold war workers who were female.

1023. Ms. Fitzpatrick applied for a position as a ""Demo Tech".

1024. Ms. Fitzpatrick was as or more qualified than males or younger persons who were hired as "Demo Techs" but was unlawfully denied a position as a Demolition Technician and discriminated against her gender, age, and/or disability or perception of disability and/or was denied the 3161 protection afforded cold war workers, which is also a violation of the public policy of the State of Ohio.

1025. As a result of the foregoing, Ms Fitzpatrick also lost tens of thousands of dollars in future earnings and retirement pay, the exact amount to be determined through discovery.

FIRST CAUSE OF ACTION
AGE DISCRIMINATION IN VIOLATION OF O.R.C. 4112.02 AND 4112.99[31]
(For all Plaintiffs except Plaintiff Teresa Fox)
(Against all Defendants except Bergin and Fees)

[p. 119]

1026. Plaintiff(s) do hereby reallege and reiterate and incorporate each and every allegation set forth in paragraphs one (1) through one thousand thirty-five (1035) as if fully rewritten herein.

1027. Plaintiffs' ages were a motivating factor for Defendants' unlawful, wrongful, and/or improper employment decisions.

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[31] O.J.I. Chapter 266

1028. Defendant(s) discriminated against Plaintiff(s) with respect to hire, pay, tenure, terms, conditions, and/or privileges of employment and to other matters directly or indirectly related to employment because of age, and/or age was a motivating factor, in violation of Ohio Revised Code Section 4112.12.

SECOND CAUSE OF ACTION
RACIAL DISCRIMINATION IN VIOLATION OF O.R.C. SECTION 4112.02[32]
(For Plaintiffs Robinson-Burks, Hurston, Watson, Gibson and Niebal)
(Against all Defendants except Bergin and Fees)

1029. Plaintiff(s) do hereby reallege and reiterate and incorporate each and every allegation as set forth in paragraphs one (1) through one thousand thirty-eight (1038) as if fully rewritten herein.

1030. Plaintiff(s) race was a motivating factor for the Defendants' unlawful, wrongful and/or improper employment decisions.

1031. Defendant(s) discriminated against the afore identified Plaintiffs with respect to hire, pay, tenure, terms, conditions, and/or privileges of employment and to other matters directly or indirectly related to employment because of race and/or race was a motivating factor, in violation of Ohio Revised Code Section 4112.12.

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[32] O.J.I. Chapter 266.

THIRD CAUSE OF ACTION
SEX/GENDER DISCRIMINATION IN
VIOLATION OF O.R.C. SECTION 4112.02[33]
(For Plaintiffs Robinson-Burks, Eby, Hurston, Watson, Coons, Andrews, Barker, Applegate, Jendrek, Niebal, Hastings, Fox, Jewett, Wittenhagen and Fitzpatrick)
(Against all Defendants except Bergin and Fees)

1032. Plaintiff(s) do hereby reallege and reiterate and incorporate each and every allegation as set forth in paragraphs one (1) through one thousand forty-one (1041) as if fully rewritten herein.

1033. The above referenced (individually and/or collectively) Plaintiffs' sex/gender was a motivating factor for the Defendants' unlawful, wrongful and/or improper employment decisions.

1034. Defendant(s) discriminated against Plaintiffs with respect to hire, pay, tenure, terms, conditions, and/or privileges of employment and to other matters directly or indirectly related to employment because of sex and/or sex was a motivating factor, in violation of Ohio Revised Code Section 4112.12.

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[33] O.J.I. Chapter 266.

[p. 120]

FOURTH CAUSE OF ACTION
DISABILITY DISCRIMINATION IN VIOLATION OF O.R.C. 4112.02 and 4112.99[34]
(Plaintiffs McKnight, Koons, Applegate, Becker, Barker, England, Spyrou, Coons, Nafziger)
(Against all Defendants except Bergin and Fees)

1035. Plaintiff(s) do hereby reallege and reiterate and incorporate each and every allegation as set forth in paragraphs one (1) through one thousand forty-four (1044) as if fully rewritten herein.

1046. Plaintiffs McKnight, Koons, Applegate, Becker and/or Barker, have a record of physical or mental impairment that substantially limits one or more major life activities.

1047. Defendant(s) discriminated against Plaintiffs McKnight, Koons, Applegate, Becker and/or Barker with respect to hire, pay, tenure, terms, conditions, and/or privileges of employment and to other matters directly or indirectly related to employment because of their handicap and/or perception of handicap, in violation of Ohio Revised Code Section 4112.12.

1048. Defendant(s) discriminated against Plaintiffs McKnight, Koons, and/or Applegate because of and/or was motivated by Plaintiffs being regarded or perceived to have a physical or mental impairment that substantially limits one or more major life activities.

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[34] O.J.I. 266.13 et seq.

1049. Plaintiffs McKnight, Koons, and/or Applegate were qualified for the jobs they were performing, as well as all other positions, and/or could/can perform the essential functions of the above referenced job positions with and/or without a reasonable accommodation.

1050. Defendants' decision to layoff and/or terminate Plaintiffs' employment and/or failure to hire and/or to otherwise discriminate, was motivated by Plaintiffs' disability and/or being regarded or perceived as being disabled.

1051. Plaintiff(s) and/or a determinative factor in Defendants' job action was that Plaintiffs were perceived and/or regarded as having a disability.

1052. Defendant(s) discriminated against Plaintiffs Becker, England, Spyrou, Coons, Barker and/or Nafziger, with respect to hire, pay, tenure, terms, conditions, and/or privileges of employment and to other matters directly or indirectly related to employment because of disability or perception of disability, in violation of Ohio Revised Code Section 4112.12.

1053. Defendant(s) discriminated against Plaintiffs Becker, England, Spyrou, Coons, Barker and/or Nafziger because of and/or was motivated by an immediate family member of Plaintiff(s) having a record of a physical or mental impairment that substantially limits one or more major life activities.

1054. Defendants' decision to layoff and/or terminate employment Plaintiff(s) Becker, England, Spyrou, Coons, Barker, and/or Nafziger was motivated by Plaintiffs' disability and/or being regarded or perceived as being disabled, and/or a determinative factor in laying off or terminating Plaintiffs' employment was that an immediate

family member was perceived and/or regarded as having a disability.

[p. 121]

FIFTH CAUSE OF ACTION
DISABILITY DISCRIMINATION IN VIOLATION OF O.R.C. 4112.02 and 4112.99[35]
(All Plaintiff who have exposures to Radiation or Hazardous Chemicals)
(Against all Defendants except Bergin and Fees)

1055. Plaintiff(s) do hereby reallege and reiterate and incorporate each and every allegation as set forth in paragraphs one (1) through one thousand fifty-four as if fully rewritten herein.

1056. Because of exposures to hazardous chemicals and/or nuclear radiation, each Plaintiff, individually and/or collectively, is regarded or perceived to have and/or is developing a physical or mental impairment that substantially limits one or more major life activities.

1057. Defendant(s) decision to layoff and/or terminate employment and/or not hire Plaintiff(s) was motivated by Plaintiff(s) disability and/or regarded or perceived as being disabled.

1058. A determinative factor in laying off or terminating Plaintiff(s) employment was that he/she/they were perceived and/or regarded as having a disability.

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[35] O.J.I. 266.13 et seq.

SIXTH CAUSE OF ACTION
NATIONAL ORIGIN DISCRIMINATION
(Plaintiff Elias Spyrou)
(Against all Defendants except Bergin and Fees)

1059. Plaintiff(s) do hereby reallege and reiterate and incorporate each and every allegation as set forth in paragraphs one (1) through one thousand fifty-eight (1058) as if fully rewritten herein.

1060. Plaintiff Elias Spyrou is, by birth, of a foreign national origin, but is at times relevant hereto, a United States Citizen.

1061. Defendant(s) knew or should have known that Mr. Spyrou is, by birth, of a foreign national origin.

1062. Plaintiff Spyrou's national origin was a motivating factor for the Defendants' unlawful, wrongful and/or improper employment decisions.

1063. Defendant(s) discriminated against Mr. Spyrou with respect to hire, tenure, terms, conditions, and/or privileges of employment and to other matters directly or indirectly related to employment, because of his national origin in violation of Ohio Revised Code Section 4112.12.

SEVENTH CAUSE OF ACTION
COMMON LAW DISCRIMINATION
(For all Plaintiffs individually and collectively)
(Against all Defendants except Bergin and Fees)

[p. 122]

1064. Plaintiff(s) do hereby reallege and reiterate and incorporate each and every allegation as set forth in

paragraphs one (1) through one thousand sixty-three (1063) as if fully rewritten herein.

1065. Defendant(s) discriminated against Plaintiffs in violation of the common law of the State of Ohio.

EIGHTH CAUSE OF ACTION
UNLAWFUL RETALIATION, DISCIPLINE AND/OR DISCHARGE
(Common Law and/or Violation of Public Policy and/or in violation of O.R.C Chapter 4112 and O.R.C § 4112.02(I))[36] (Against all Defendants)

1066. Plaintiff(s) do hereby reallege and reiterate and incorporate each and every allegation as set forth in paragraphs one (1) through one thousand sixty-five (1065) as if fully rewritten herein.

1067. During the period of time set forth in his Complaint a clear public policy, existed, and exists at the filing of this lawsuit, that is manifested in Constitution, statues and/or administrative directives, and/or regulations (including DOE directives and regulations), "Vietnam War Veterans protections, Section 3161 of the National Defense Authorization Act for fiscal year 1993 and administrative rules, regulations and directives associated therewith, and/or in the common law of the United States and/or State of Ohio, and state and federal RICO statutes and including, but not limited to, O.R.C. Section 4112, and/or various prohibitions against retaliating and/or discriminating against an employee and/or a candidate for employment.

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[36] See e.g., *Painter v.Graley (1994), 70 Ohio St.3d 377.*

1068. The actions and/or omissions by Defendants set forth above, and under the circumstances set forth above would jeopardize the aforementioned public policy.

1069. The actions against Plaintiffs' employment, individually and/or collectively, and the circumstances attendant thereto was in violation of public policy and common law of the State of Ohio, and set forth herein, which proximately resulted in damages to each Plaintiff.

1070. Separately, Plaintiff Vicki Fitzpatrick was a witness in an investigation of discrimination. At all relevant times Defendants Baker, Higgins and the Corporate Defendants were employers of Ms. Fitzpatrick as defined by R.C. § 4112.01 (A)(2).

1071. Ms. Fitzpatrick provided information as a witness as previously set forth herein, and the Defendants, individually and/or collectively responded by taking adverse employment action against Ms. Fitzpatrick as previously set forth in this Complaint.

1072. Defendants also took other adverse actions against Plaintiff Fitzpatrick and discriminated against her in various ways because she opposed unlawful discrimination practices as defined in Chapter 4112 and/or because she made a charge, testified, assisted, participated in any manner in an investigation, proceeding or hearing under §§ 4112.01 to 4112.07 of the revised code and/or because the Defendants perceived that Plaintiff Fitzpatrick would do so if they did not so act.

[p. 123]

NINTH CAUSE OF ACTION
BREACH OF CONTRACT/THIRD-PARTY BENEFICIARY TO CONTRACT[37]
(Against all Defendants except Higgins, Bergin and Fees)

1073. Plaintiff(s) do hereby reallege and reiterate and incorporate each and every allegation as set forth in paragraphs one (1) through one thousand seventy-two (1072) as if fully rewritten.

1074. The contract for remediation of the Mound Facility between DOE and the corporate Defendants, their agents, and/or subsidiaries, contained provisions and/or promises (including those set forth above), for which the work force, including Plaintiff(s), were the intended beneficiary.

1075. The circumstances of the contract indicate that the DOE and/or Defendants intended to give the workers of the Mound Facility, including Plaintiffs, the benefit of performance and/or the performance of the promise satisfied the obligation.

1076. Defendant(s) breached said third-party beneficiary provisions.

1077. Separately, Plaintiffs Weinman, Bruno and/or Eby had a contract recognizing their years as leased employees to be

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[37] *Visintine & Co. v. Railroad Co.* (1959), 169 Ohio St. 505; *Emmitt v. Brophy* (1984), 42 Ohio St. 82; *Chitlik v. Allstate Ins. Co.* (1973), 34 Ohio App.2d 193, 196; *Leyman v. Piggly-Wiggly Corp.* (1951), 90 Ohio App. 506.

credited towards their vesting service. Alternatively, these Plaintiffs were third-party beneficiaries to the DOE remediation contract that protected and/or credited these years of vesting service.

1078. Defendant(s) breached said contract by not crediting Plaintiffs Weinman's, Bruno's and/or Eby's years as leased employees.

1079. Separately, Plaintiff Barker had a contract with Defendant(s) BWXT and/or BWXTO, agreeing to honor her vesting service with an adjusted hiring date of October 27, 1968, for all purposes.

1080. Defendants' severance pay did not honor his agreement but, rather, only recognized here service since November 7, 1997, and, therefore, was in breach of the agreement resulting in injury or damages of denial of a benefit to Plaintiff.

1081. Defendant(s) breached said contract(s) in that they failed to perform or inadequately performed the promises that were for Plaintiffs' benefit.

TENTH CAUSE OF ACTION
EQUITABLE ESTOPPEL[38]
(Against all Defendants)

1082. Plaintiff(s) do hereby reallege and reiterate and incorporate each and every allegation as set forth in

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[38] O.J.I. Section 253.12. *Minnesota Mining and Manuf. v. Blume* (SD Oh. 1979), 553 F.Supp. 493, 517, *affd.*684 F.2d 1166 *cert. den.* 103 S.Ct. 1449.

paragraphs one (1) through one thousand eighty-one (1081) as if fully rewritten herein.

[p. 124]

1083. Defendant(s) their agents and/or employees made a positive assertion(s) and/or representation(s) of present and/or past fact(s) to the Plaintiff(s) that was false.

1084. Defendants' conduct was calculated to convey an impression of the existence of facts and/or circumstances as being true, which were actually not in existence and/or were false.[39]

1085. Defendant(s) had knowledge and/or control of truth regarding these material facts and/or the circumstances of their assertion(s) and/or conduct was such that this knowledge was reasonably and necessarily imputed to Defendant(s).[40]

1086. Defendant(s) concealed the truthful information and/or their knowledge of the truth.

1087. Defendant(s) should have reasonably expected that their representation(s) to induce action and/or forbearance and/or reliance by the Plaintiff(s).

1088. Plaintiff(s') knowledge of the facts was less than that of Defendant(s).

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[39] *Yackel v. Kay* (1994), 95 Ohio App.3d 472, 480; *Kosa v. Pruchinsky* (1992), 82 Ohio App.3d 649.

[40] *Doe v. Blue Cross* (1992), 79 Ohio App.3d 369.

1089. There was action and/or forbearance and/or reliance by Plaintiff(s).

1090. Action and/or forbearance and/or reliance by Plaintiff(s) were reasonable and foreseeable.[41]

1091. Plaintiff(s) were, injured as a result of the action and/or forbearance and/or reliance by Plaintiff(s).

ELEVENTH CAUSE OF ACTION
PROMISSORY ESTOPPEL[42]
(Against all Defendants except Higgins and Fees)

1092. Plaintiff(s) do hereby reallege and reiterate and incorporate each and every allegation as set forth in paragraphs one (1) through one thousand ninety-two (1092) as if fully rewritten herein.

1093. Defendant(s) their agents and/or employees made a promise(s) to the Plaintiff(s).

1094. Defendant(s) should have reasonably expected that their promise(s) to induce action and/or forbearance and/or reliance by the Plaintiff(s).[43]

1095. There was action and/or forbearance and/or reliance by Plaintiff(s).

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[41] *Shapley, Inc. v. Norwood* (1984), 20 Ohio App.3d 164; *Laisy v. Shaker Heights* (1986) 33 Ohio Misc.2d 3.

[42] Eg. *Mers v. Dispatch Prinying Co.* (1985), 19 Ohio St.3d 100, 104-105; Restatement Contracts 2d Section 90.

[43] *The Limited Stores, Inc. v. Pan Am. World Airways, Inc.* (1992), 65 Ohio St.3d 66, 73.

1096. Action and/or forbearance and/or reliance by Plaintiff(s) were reasonable and foreseeable.

1097. Plaintiff(s) were, damaged as a result of the action and/or forbearance and/or reliance by Plaintiff(s).[44]

[p. 125]

1098. Injustice can only be avoided by enforcement of the promise(s) and representations asset forth above.[45]

TWELFTH CAUSE OF ACTION
NEGLIGENT MISREPRESENTATION
(Plaintiffs Andrews, England, Hurston, Weinman, Barker, Becker, Bruno, Christopher, and Fitzpatrick)
(Against all Defendants)

1099. Plaintiff(s) do hereby reallege and reiterate and incorporate each and every allegation as set forth in paragraphs one (1) through 1070 as if fully rewritten herein.

1100. The Defendant(s) negligently gave false information to the above referenced Plaintiff(s), which caused him or her to take action or forbear from taking action. Plaintiff(s) reasonably relied upon said information from the Defendant(s), which resulted in harm to Plaintiff(s).

1101. As set forth above, this negligent information consisted of the various representations that these Plaintiff(s) were not subject to the ISP and/or would not be laid off, which was crafted so as to result in the reasonable and

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[44] *Karnes v. Doctors Hosp.* (1990), 51 Ohio St.3d 139, 142.
[45] *Tally v. Teamsters* (1976), 48 Ohio St.2d 142, 146.

foreseeable expectation by each that they would not be laid off.

1102. Separately the Corporate Defendants their agents and/or employees gave false information and made false representations to Ms. Fitzpartick relative to the aforementioned investigation of Peyton Baker and Barbara Hood. This information included, but was not limited to that the information she provided would be kept confidential and not revealed in any manner that would identify her as the source and that her position would be protected.

1103. The misrepresentations and miscommunications by Defendant(s) proximately caused injury to Plaintiff(s).

THIRTEENTH CAUSE OF ACTION
DUTY AND/OR GOOD FAITH AND FAIR DEALINGS AND/OR BAD FAITH CONTRACT[46]
(Against all Defendants)

1104. Plaintiff(s) do hereby reallege and reiterate and incorporate each and every allegation as set forth in paragraphs one (1) through one thousand one hundred-four (1104) as if fully rewritten herein.

1105. Defendant(s) were in a far superior position to have knowledge of facts and circumstances surrounding the employment terms and conditions and circumstances of Plaintiff(s) and had a duty to disclose same to Plaintiff(s).

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[46]*Perritt*, The Future of Wrongful Dismissal Claims..., (1989), 58 U.Cin.L.Rev. 397; *Criner v. Urologic Phy. & Surg.* (2000) unrep. Second Dist. App. Case No. 2000-CA-28.

1106. Defendant(s) thereupon had a fiduciary duty to Plaintiff(s) and the duty of good faith and fair dealings in regards to employment and the terms, conditions and circumstances required of performance.

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1107. The Defendant(s) breached fiduciary duties along with the duty of good faith and fair dealings, proximately resulting in damages to the Plaintiff(s).

1108. The Defendant(s) tortuously conducted themselves in violation of State law regarding the circumstances surrounding the employment contract(s), its execution and performance, as well as in regards to duties arising directly from the contract(s).

1109. Defendant(s) had duties towards the Plaintiff(s) to act in good faith, and not bad faith, in regards to Plaintiffs' associations, rights, benefits, and expectations. These constitute liberty and property interests recognized under the First and Fourteenth amendments of the United States Constitution, as well as corresponding provisions in the Constitution of the State of Ohio.

1110. Defendant(s) acted with actual and/or implied malice, wrongfully and without reasonable justification to do so and breached the aforesaid duties and acted in bad faith, in violation of the law of the State of Ohio, proximately resulting in damages to Plaintiff(s).

FOURTEENTH CAUSE OF ACTION
QUANTUM MERUIT
(Plaintiffs Nafziger, Spyrou, Robinson-Burks, Eby, Hurston, Watson, Coons, Andrews, Bowling, Lamsa, Barker, Niebal, Koons, Bruno, Hastings, Fox, McKnight, and Gibson)
(Against all Defendants except Bergin, Fees and Higgins)

1111. Plaintiff(s) do hereby reallege and reiterate and incorporate each and every allegation as set forth in paragraphs one (1) through one thousand one hundred-ten (1110) as if fully rewritten herein.

1112. Plaintiff(s) Nafziger, Spyrou, Robinson-Burks, Eby, Hurston, Watson, Coons, Andrews, Bowling, Lamsa, Barker, Niebal, Koons, Bruno, Hastings, Fox, McKnight, and Gibson performed services and/or work for Defendants' benefit and with Defendant(s) knowledge under circumstances in which Defendant(s) knew or should have known that the services and/or work was given and received with the exception of payment of reasonable value.

1113. Plaintiff(s) did not receive reasonable value for services rendered.

FIFTEENTH CAUSE OF ACTION
R.I.C.O. VIOLATION
(18 U.S.C. § 1961; O.R.C. § 2023.31 Et Seq.; § 2923.34(C)(4); and 29 U.S.C. § 201 Et. Seq.)
(Against all Defendants)

1114. Plaintiff(s) do hereby reallege and reiterate and incorporate each and every allegation as set for in paragraphs one (1) through one thousand one hundred-fourteen (1114) as

if fully rewritten herein. Defendant(s), in violation of O.R.C. 2923.31 et. seq., 2923.34 (C) (4); 18 U.S.C. § 1961; and 29 U.S.C. § 201 et. seq., constructed, created, engaged in and/or participated in the affairs of an enterprise and engaged in a pattern of corrupt activity.

1115. Defendant(s) corrupt activity was violative of legal and contractual requirements, and resulted in the knowing deprivation of property of the Plaintiff(s).

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1116. Defendant(s) corrupt activity, which was undertaken for the purpose of increasing profits, increasing bonuses, and improving the appearance of their performance included: a) Depriving employees of benefits by failing to credit Plaintiffs' Bruno, Weinman, Eby and Barker for their time of service at the Mound Facility; b) Inducing Plaintiffs Andrews, England, Hurston, Weinman, Barker, Becker, and Bruno to refrain from participating in the VSP, then by terminating them in the ISP; c) Terminating Plaintiffs Christopher, Nafziger, Becker, and Spyrou, because they complained of improper management practices, including falsification or request s to falsify records; d) Failing or refusing to provide all Plaintiff(s) with the benefits to which they were promised and to which they were entitled; e) Other acts of the Defendant(s) to be ascertained through discovery.

1117. Defendant(s) violated ERISA by targeting individuals who would be eligible to retire between 2001 and 2006.

SIXTEENTH CAUSE OF ACTION
INTENTIONAL AND/OR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS
(Against all Defendants)

1118. Plaintiff(s) do hereby reallege and reiterate and incorporate each and every allegation as set forth in paragraphs one (1) through one thousand one hundred-eighteen (1118) as if fully rewritten herein.

1119. The Defendant(s) above described conduct jointly and severally, was intentional, reckless and/or negligent.

1120. Defendant(s) deliberately, knowingly and/or recklessly and/or negligently disregarded a high degree of probability that emotional distress would follow their actions, statements and/or omissions to each Cold War Plaintiff(s). Alternatively, Defendant(s) should have realized that his/their conduct involved an unreasonable risk of causing Plaintiff(s) serious emotional distress.

1121. The emotional distress resulting from the actions and/or failure by Defendant(s) was severe and disabling.

1122. The Defendant(s) above described conduct, jointly and severally, was extreme and outrageous and of such a nature that no reasonable person should be made to endure it.

1123. The harmful effects of Defendant(s) conduct were foreseeable by any reasonable person.

1124. The aforesaid conduct proximately caused Plaintiff(s) severe emotional distress, physical injury and loss of consortium.

SEVENTEENTH CAUSE OF ACTION
FAILURE TO PROPERLY SUPERVISE
AND ADMINISTER
(Against all Defendants)

1125. Plaintiff(s) do hereby reallege and reiterate and incorporate each and every allegation as set forth in paragraphs one (1) through one thousand one hundred twenty-four (1124) as if fully rewritten herein.

[p. 128]

1126. Defendant(s) encouraged, participated in and/or implicitly authorized, approved or knowingly acquiesced in the misconduct of subordinates towards Plaintiff(s).

1127. Defendant(s) encouraged, participated in and/or implicitly authorized, approved, or knowingly acquiesced in the misconduct of subordinates/employees as previously alleged.

1128. Defendant(s) failure to properly supervise was a result of deliberate indifference to a pattern of unlawful and/or unconstitutional acts committed by Defendant(s) and others both in this case and/or other similar situations.

1129. As a direct and/or proximate result of Defendant(s) actions and/or omissions, Plaintiff(s) were injured.

EIGHTEENTH CAUSE OF ACTION
INTERFERENCE WITH PROTECTED RIGHTS
PURSUANT TO 29 U.S.C. § 1140
(Plaintiffs Nafziger, Christopher, Becker, Spyrou, England, Eby, Jendrek, Hurston, Gibson, Watson, Barker, McKnight, Bruno, Applegate, Koons, Coons, Weinman, Tayse, Andrews, Jewett, Bowling, Lamsa, Hastings, Wittenhagen, Niebal and Fitzpatrick)
(Against all Defendants)

1130. Plaintiff(s) do hereby reallege and reiterate and incorporate each and every allegation as set forth in paragraphs one (1) through one thousand one hundred twenty-nine (1129) as if fully rewritten herein.

1131. Each of the above-identified Plaintiff(s) was a participant or beneficiary under an ERISA plan.

1132. Each of the above identified Plaintiff(s) were discharged and/or discriminated against for the purpose of interfering with the attainment of any right to which such participant may become entitled under the ERISA plan in violation of 29 U.S.C. § 1140.

1133. As a result, Plaintiff(s) were injured.

NINETEENTH CAUSE OF ACTION
FRAUD AND INTENIONAL MISREPRESENTATION[47]
(Against all Defendants)

1134. Plaintiff(s) do hereby reallege and reiterate and incorporate each and every allegation as set forth in paragraphs one (1) through one thousand one hundred thirty-three (1133) as if fully rewritten herein.

1135. Defendant(s) directly and/or through their agents, servants and employees made false representations of fact relative to benefits, the VSP, ISP wages and other matters set forth previously in this Complaint to Plaintiff(s), collectively and individually.

[p. 129]

1136. Defendant(s) made their false representations to deceive Plaintiff(s) with the view of gaining an unlawful or unfair advantage over Plaintiff(s), which caused Plaintiff(s) to take action or forbear from taking action, which would otherwise be unacceptable.[48]

1137. Defendant(s) made these representations with knowledge of its falsity and/or with utter disregard and/or reckless indifference about its falsity.[49]

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[47] O.J.I. Chapter 307.

[48] *Issac v. American Sur. Co.* (1939), 61 Ohio App. 47.

[49] *Burr v. Stark Co. Bd. of Commrs.* (1986), 23 Ohio St.3d 69.

1138. Defendant(s) knowingly concealed fact(s), which was done when and/or where there was duty to disclose.[50]

1139. Defendant(s) misrepresentation(s) and/or failure to disclose was material.[51]

1140. Defendant(s) misrepresentation(s) and/or failure to disclose was made with intent of misleading Plaintiff(s) into reliance.[52]

1141. Plaintiff(s) reasonably and/or justifiably relied upon said information from Defendant(s), which resulted in harm to Plaintiff(s).

1142. Defendant(s) had actual or constructive notice and/or knowledge of the wrongful and/or unlawful acts set forth above, as well as the consequences of their failure to properly administer and/or supervise principals and/or other administrators who were charged with responsibility and oversight of teachers and/or allocation of resources.

1143. The misrepresentations, miscommunications and failure to properly supervise and/or administer by Defendant(s) proximately caused injury to Plaintiff(s).

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[50] *Gaines v. Preterm-Cleveland Inc.* (1987), 33 Ohio St.3d 54.
[51] *J.B. Colt Co.l v. Wasson* (1922), 15 Ohio App. 484.
[52] *Cohen v. Lamko* (1984), 10 Ohio St.3d 167, 169.

TWENTIETH CAUSE OF ACTION
BREACH OF FIDUCIARY DUTY
(Against all Defendants)

1144. Plaintiff(s) hereby reallege and reiterate and incorporate each and every allegation a set forth in paragraphs one (1) through one thousand one hundred forty-four (1144) as if fully rewritten herein.

1145. Defendant(s) were in a far superior position to have knowledge of facts and circumstances surrounding the employment terms and conditions of Plaintiff(s) and had a duty to disclose same to him.

1146. Defendant(s) had a fiduciary duty to Plaintiff(s) and the duty of good faith and fair dealings in regards to any employment contract and the terms, conditions and circumstances required of performance.

1147. The Defendant(s) breached fiduciary duties along with the duty good faith and fair dealings, proximately resulting in damages to the Plaintiff(s).

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TWENTY-FIRST CAUSE OF ACTION
CIVIL CONSPIRACY (Against all Defendants)

1148. Plaintiff(s) incorporate each and every allegation as set forth in paragraphs one (1) through one thousand one hundred forty-seven (1147) as if fully rewritten herein.

1149. Defendant(s), jointly and severally, conspired among themselves and between themselves to intentionally or recklessly commit unlawful acts against Plaintiff(s),

individually and collectively, including, but not limited to, acts, conduct and statements with the purpose of harming and/or destroying Plaintiffs reputation, relationships and associations, professional and private standing in the community and to destroy or diminish Plaintiff(s) present and/or future livelihood and/or earnings, as well as the potential therefore.

1150. Defendant(s), jointly and severally, may also have conspired with others, who have not yet been fully identified, but who will be disclosed in the course of discovery, to intentionally commit unlawful acts against Plaintiff(s), including, but not limited to, acts, conduct and statements with the purpose of harming and/or destroying Plaintiffs reputation, relationships and associations, professional and private standing in the community and to destroy or diminish Plaintiff(s) present and/or future livelihood and earnings, as well as the potential therefore.

TWENTY-SECOND CAUSE OF ACTION
RECKLESS CONDUCT, MALICE,
PUNITIVE DAMAGES
(COMMOM LAW AND R.C. 2315.21)
(Against all Defendants)

1151. Plaintiff(s) do hereby reallege and reiterate and incorporate each and every allegation as set forth in paragraphs one (1) through one thousand one hundred fifty-one (1151) as if fully rewritten herein.

1152. The acts and omissions of Defendant(s), as set forth above, were intentional, willful recklessness, malicious, and/or purposeful and/or constitute common law and actual malice.

TWENTY-THIRD CAUSE OF ACTION
LOSS OF CONSORTIUM
(Against all Defendants)

1153. Plaintiff(s) hereby reincorporate and reallege the allegations contained in paragraphs one (1) through one thousand one hundred fifty-two (1152) as if fully rewritten herein. All the Defendant(s) are included in this count.

1154. That as a proximate result of the joint and several wrongful conduct of the Defendant(s), the Plaintiff(s) and their spouses have suffered a loss of sex, society, companionship, and consortium.

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TWENTY-FOURTH CAUSE OF ACTION
CLASS ACTION

1155. Plaintiff(s) do hereby reallege and reiterate and incorporate each and every allegation as set forth in paragraphs one (1) through one thousand one hundred fifty-four (1154) as if fully rewritten herein. All Defendant(s) are included in this count.

1156. Pursuant to Fed. R. Civ. P. 23, and in addition to a Motion for Class Certification to be filed with the Court after the filing of this Complaint, Plaintiff(s) ask the Court to certify the case at bar as a class action.

1157. The joinder of all potential members of the class, those who have been or may be harmed pursuant to conduct the same or substantially similar to that alleged herein, is impracticable, the questions of law and fact, which arise herein are common to those raised with regard to the other

members of the class, the class representatives (Plaintiff(s) herein) can adequately manage and represent the interests of the class, and adjudication of this matter, and the issues raised herein will prevent the need for repeated and duplicative litigation.

WHEREFORE, the Plaintiff(s) requested that this Court enter judgment against the Defendant(s) and grant the Plaintiff(s) the following relief:

a) Compensatory damages;

b) Punitive damages;

c) Equitable relief including, but not limited to, back pay, front pay, past and future lost benefits, and an apology;

d) Treble damages for failure to pay overtime.

e) An award of cost of this lawsuit, including reasonable attorney fees; and

f) Such other and further relief to which Plaintiff(s) are entitled either in equity or at law.

Respectfully submitted,

BRANNON & ASSOCIATES

/s/
Dwight D. Brannon (0021657)
Attorney for Plaintiffs
124 E. Third St. Suite, 403
Dayton, Ohio 45402
(937) 228-2309 Ext. 3005

/s/
John J. Scaccia (0022217)
Attorney for Plaintiffs
124 E. Third St. Suite, 408
Dayton, Ohio 45402
(937) 228-2306 Ext. 3012

[p. 132]

JURY DEMAND

Plaintiffs hereby demand a trial by jury for all claims and causes of action advance herein.

/s/
John J. Scaccia (0022217)
Attorney for Plaintiffs

APPENDIX I

Edit Searches on Thomson West

page 1 of 1
Edit Search: dismiss! /p f.r.c.p. /2 8(a) & da(aft 05/01/2005 & bef /1 **Database:** dct

http://web2.westlaw.com/result/dctopnavigation.aspx?utid=%7bCEF055]:0-A245-4B28-9... 2/12/2007

page 1 of 1
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page 1 of 1
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page 1 of 1
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Results: 816 Documents

APPENDIX J

See Fold-Out Exhibit

United States of America Passport
of John Joseph Scaccia

The Secretary of State of the United States of America
hereby requests all whom it may concern to permit the citizen/national
of the United States named herein to pass without delay or hindrance
and in case of need to give all lawful aid and protection.

Le Secrétaire d'Etat des Etats-Unis d'Amérique
prie par les présentes toutes autorités compétentes de laisser passer le citoyen/
ressortissant des Etats-Unis titulaire du présent passeport, sans délai ni
difficulté et, en cas de besoin, de lui accorder toute aide et protection légitimes.

El Secretario de Estado de los Estados Unidos de América por el presente solicita a las
autoridades competentes permitir el paso del ciudadano o nacional de los Estados Unidos
aquí nombrado, sin demora ni dificultades, y en caso de necesidad, prestarle toda la
ayuda y protección lícitas.

SIGNATURE OF BEARER/SIGNATURE DU TITULAIRE/FIRMA DEL TITULAR

NOT VALID UNTIL SIGNED

PASSPORT
PASSEPORT
PASAPORTE

USA

UNITED STATES OF AMERICA

Type/Type/Tipo: P
Code/Code/Código: USA
Passport No./No. de passeport/No. de pasaporte: [redacted]

Surname/Nom/Apellidos
SCACCIA

Given names/Prénoms/Nombres
JOHN JOSEPH

Nationality/Nationalité/Nacionalidad
UNITED STATES OF AMERICA

Date of birth/Date de naissance/Fecha de nacimiento
24 Apr 1964

Sex/Sexe/Sexo: M
Place of birth/Lieu de naissance/Lugar de nacimiento
PENNSYLVANIA, U.S.A.

Authority/Autorité/Autoridad
New Orleans Passport Agency

Date of expiration/Date d'expiration/Fecha de caducidad
07 Feb 2005

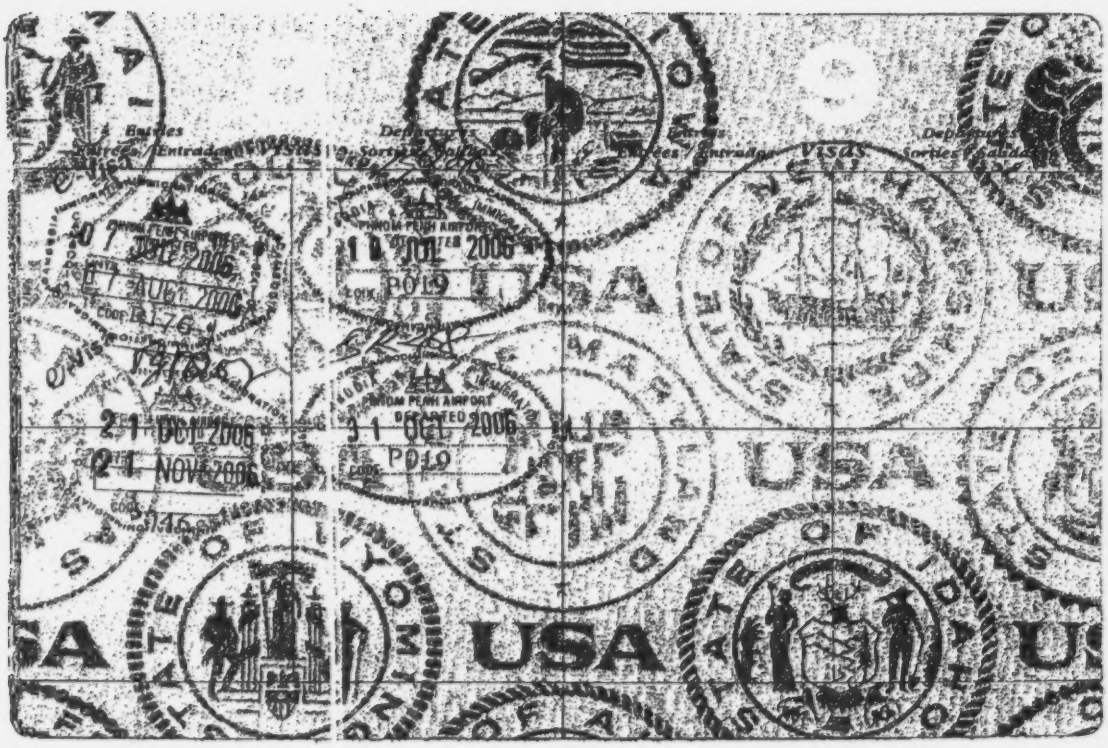
Amendments/Modifications/Enmiendas
06 Feb 2015

See Page 24

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